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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

AT THE
TERMS OF JANUARY, APRIL
AND
SEPTEMBER, 1920

E. T. WELLS, REPORTER.*
NEWTON C. GARBUTT, REPORTER.†

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Cases Argued and Determined
In
The Supreme Court of the
State of Colorado
At January Term, A. D. 1920

No. 9658.

ORIN *v.* THE PEOPLE.

Prosecution for the Violation of the Prohibitory Liquor Law. The evidence examined and held entirely insufficient to sustain a conviction.

Error to Morgan District Court, Hon. L. C. Stephenson, Judge.

Mr. PAUL DELANEY, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. CHAS. H. SHERRICK, assistant, for The People.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff in error was charged in three separate informations with the violation of the prohibitory liquor law, all filed on the 25th day of January, 1919.

The first information charged the unlawful carrying of liquor into the state without marking conspicuously, as provided by the act of 1915. The second information charged the unlawful carrying of liquor from one point to another within the state. The third information charged the unlawful carrying of liquor upon defendant's person and in an automobile.

The cases were consolidated for the purpose of trial and the defendant was convicted in each case and cumulative sentences of imprisonment imposed.

Other persons were jointly charged with defendant but the record does not disclose what disposition of the cases was made as to them.

There are many assignments of error, but it is not necessary to consider all of them. It is perhaps sufficient to say that there was no sufficient testimony upon the trial to justify a conviction in either case.

The evidence seems to show that two automobiles left Cheyenne, Wyoming, in the evening, one a Buick Six, and the other a King Eight, and it is contended that these same automobiles were found at the farm premises of a man named Berks, in Morgan County, Colorado, early the next morning. There is no substantial evidence of the identity of the machines leaving Cheyenne with those found at Berks' farm. There is no testimony to disclose that either of the machines carried any liquor when they left Cheyenne. It is plain that there was no liquor or packages in either machine when found at the farm of Berks, but a quantity of whiskey was at the time found in a manger in Berks' barn, and also near a chicken coop where it was hidden under a pile of straw. There is testimony that the defendant was in Cheyenne on the day of the evening in which it is said that the machines left that point, and that he had some repairs made on a Buick Six automobile that day. There is no testimony that the defendant drove, rode in, or was in charge or possession of either machine when they left Cheyenne or at any time afterward.

It does appear that the defendant and Berks and another man were driving in a Ford machine shortly after the officers discovered the machines and liquor at Berks' farm, apparently going in the direction of Berks' house. It also appears that later, Berks and another man soon thereafter arrived at his house where he entertained the party at breakfast, but the defendant was not with them, and was

not seen by the officers. It appears that when the machines were discovered by the officers, the Buick had a hole shot in the tank and the windshield broken out, and was without a tire on either front wheel. It also appears that there were on that night some constabulary officers stationed at the town of Keota, Colorado, and it is contended that these officers, in attempting to stop the machines, fired shots at them, but no witness testified as to firing a shot or as to hearing a shot fired, or that there were officers present at the time.

There is no testimony in the case to show that the defendant at any time had any intoxicating liquor in his possession, either at Cheyenne, or at any time or place prior to the discovery of the liquor at Berks' farm, nor that he was at or upon the premises at or before that time. Indeed, the testimony shows affirmatively that he was not there. There is testimony to show that the defendant hired passage in an automobile to go from some point in Morgan County, later in the day, to his home in the city of Denver. The only testimony as to any facts in the case tending to show any incrimination of the defendant in any respect is that he was in the city of Cheyenne the day preceding the alleged transportation of liquor, that he was in possession of a Buick automobile, that he was seen the next day riding with Berks in Morgan County in a Ford automobile, and afterward went from that county to his home in Denver; and also, testimony that his wife afterward claimed to be the owner of the Buick automobile in question. These may be suspicious circumstances tending to indicate guilt, but certainly no stronger. Just why the court permitted a conviction to stand or even permitted the case to go to the jury under the state of facts presented is not easily understood.

It seems that the defendant was not arrested until about thirty days after the warrant was issued, when he called up the sheriff at Fort Morgan from Denver, and asked if it was true that the sheriff had a warrant for him, and being answered in the affirmative, told the sheriff that he would

go to Fort Morgan that afternoon and submit to arrest, which he did. There is no testimony that in the meanwhile he had concealed himself, or had at any time been absent from the city or in any way attempted to evade arrest. But the court gave the following instruction: "The flight of a person immediately after a crime is committed with which he is charged, is a circumstance in establishing guilt, not sufficient in itself to establish guilt, but a circumstance which the jury may consider. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts in the case."

In the absence of any testimony showing any attempt, effort or purpose on the part of the defendant to flee, this instruction was highly prejudicial and sufficient in itself to cause a reversal of the case.

In view of what has been said, it is not important to consider any other assignments of error.

The judgment is reversed.

Garrigues, C. J. and Denison, J. concur.

No. 9672.

WILLIAMS v. ESCHEMAN.

JUSTICE OF THE PEACE—*Appeals—Bond.* An appeal bond although approved was neither filed by nor left with the justice, but carried from him to the clerk of the county court, who failed to approve it. The appeal was dismissed.

Error to Costilla County Court, Hon. J. E. Sanchez, Judge.

Mr. J. D. PILCHER and Mr. CHARLES H. WOODARD, for plaintiff in error.

Mr. ELIAS H. ELLITHORP, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was begun in a justice court in Costilla County by defendant in error, Escheman, against the plaintiff in error, Williams. Judgment in that court was for plaintiff. Notice of appeal was filed by the defendant in apt time, and a bond was submitted to the justice for his approval. The bond, however, was not left with or filed by the justice, but was carried away by counsel for defendant. The justice delivered all of the other papers in the case to the clerk of the County Court, and later counsel for the defendant lodged the appeal bond with that officer, but he did not approve the same.

Upon this state of the record defendant in error appeared specially in the County Court and moved to dismiss the cause upon the ground that the appeal had not been perfected, in that the bond which had been approved by the justice, had not been filed in the cause, and that when it was filed with the clerk of the County Court that officer had not approved it. The motion to dismiss was granted and judgment entered accordingly, which judgment is now here for review.

The sole question for determination is whether the appeal bond which the defendant purported to furnish was filed with the justice of the peace before whom the case was tried. It appears that the bond was approved by him, but that after such approval he surrendered the possession of it to the attorney for the defendant, by whom it was later delivered to the clerk of the County Court. It appears that the appellate proceeding was attempted under that provision of the revised statutes of 1908 which reads in part as follows:

"The party desiring such appeal may file his bond in the office of the justice who rendered the judgment, such bond to be approved by such justice * * *."

What constitutes the filing of a document is discussed in *Yates v. Tatum*, 60 Colo. at page 486, 155 Pac. 329, as follows:

"It is conceded that the bond was not marked 'filed' in the justice court, and the finding that it was there filed is

in terms based upon the fact that it had been approved by the justice. This is contrary to the accepted definition of "filing."

'In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received that it may become a part of the public record.' Bouvier Law Dictionary; *People v. Peck*, 67 Hun. 560-570, 22 N. Y. Supp. 576.

"The thing essential to a filing is a deposit of the paper with the officer, with notice of the purpose, and intent that he should retain it. *Eldred v. Malloy*, 2 Colo. 22."

In the syllabus of that case this was said: "It is essential to the filing of any document that it should be deposited with the officer entitled to receive it, with notice to him of the purpose, and with intent that he shall retain it.

"An appeal bond approved by a justice of the peace, but which is not deposited with him, but carried to the County Court, is not filed with the justice and has not the effect to perfect the appeal."

Section 3894, R. S. 1908, in relation to appeals from justice courts to County Courts provides that the party seeking such appeal may file his bond in the office of the clerk of the County Court within ten days from the rendition of the judgment from which he desires to take an appeal, and that in that event the clerk of the County Court shall approve such bond. In the case at bar the bond was filed with the clerk of the County Court, but was not approved by him.

The effect of the filing of the appeal bond with the clerk of the County Court, and neglecting to have that officer approve the instrument is discussed in *Adams v. Decker*, 50 Colo. 236, at page 239, 114 Pac. 654, as follows: "The provisions relating to the time within which an appeal from the judgment rendered by a justice of the peace to the county court may be taken, is mandatory, and jurisdictional, and unless the party praying the appeal shall,

within ten days from the rendition of the judgment by the justice of the peace, enter into a bond with approved securities, and, if the appeal is not thus taken within this statutory period, the county court has no jurisdiction, and should dismiss the appeal, either on its own or appellee's motion. *Horn v. Martin*, 38 Colo. 364, 87 Pac. 1073. It stands undisputed upon the record, that, at the time the appeal bond was filed in the county court, there was a regularly appointed, duly qualified, and acting clerk of that tribunal; that the bond was never approved by that official, notwithstanding the recital in the supersedeas, but was approved by the judge. Until the bond was approved by the proper official, it was of no force or effect. Merely filing it was not sufficient. * * * The defendant may have had a good defense in the action which he sought to have tried on appeal to the county court, but appeals are creatures of the statute, and a party desiring to avail himself of the right to a trial *de novo* by taking an appeal must comply with the provisions of the statutes on the subject."

In considering the identical question involved in this case this court in *Predovich v. Predovich*, 49 Colo. 578, at page 581, said:

"While it is true that appellant may file his appeal bond and have it approved either in the court of the justice of the peace or in the County Court, he may not, with the one bond, proceed partly under one section and partly under another of the pertinent statute."

It is contended that appellee was proceeding under section 2858 only, and that the bond was in reality filed with the justice, and sent by him separately to the clerk of the County Court. An inspection of the record, however, utterly fails to support this contention. The bond was never filed in the justice court, and there was no compliance with the requirements of the statute in this respect.

The judgment of the trial court was correct, and the judgment of dismissal is affirmed.

Judgment affirmed.

Mr. Chief Justice Garrigues and Mr. Justice Allen concur.

No. 9778.

AMAYA v. THE PEOPLE.

PRACTICE IN ERROR—*Record*. The record presented upon application for a supersedeas failing to show an objection taken to any instruction given, or that any instructions were tendered on the part of the accused, or any exception taken to the giving or refusal of any instruction, the instructions given being fair, rulings as to the admission or exclusion of evidence devoid of prejudice, and no errors being assigned, the judgment was affirmed.

Department One.

Error to Otero District Court, Hon. James A. Park, Judge.

Mr. B. C. DURALL, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. FORREST C. NORTHCUTT, assistant, for The People.

Mr. Justice Burke delivered the opinion of the court.

PLAINTIFF in error, hereinafter designated as defendant, was convicted of burglary and larceny, and sentenced to a term of from three to five years in the state penitentiary. From that judgment he brings error and asks the issuance of a supersedeas.

In addition to the briefs of counsel, five documents are filed here. 1. Certified copies of the information, verdict, instructions, motion for new trial, order overruling the same, and judgment. These are further certified by the clerk of the trial court as "The original bill of exceptions filed in my office," but bear no such file mark. This document is O. K'd. by the deputy District Attorney, "as certified," whatever that may mean. 2. A transcript of the evidence at the trial. This is signed and sealed by the judge, and was filed in the court below. 3. An application for writ of supersedeas. 4. A so-called "Assignment of errors" which is a sort of desultory comment on the trial, containing citations of authority, long excerpts from the evidence, etc. 5. "Defendant's request for Instructions."

These are seven in number and are signed by defendant's counsel but are not certified.

There is nothing in this record to indicate that an objection was made to any instruction given by the court or that the so-called requested instructions of the defendant were ever tendered, or that the trial judge ever saw them, or that any exception was saved to any ruling made on the subject of instructions. A very few exceptions were saved to rulings on evidence. These matters we pass by with the observation that the instructions given seem fair and the rulings on evidence devoid of prejudice. They will not be further considered because of the absence of any proper assignment of error.

"Plaintiff in error shall assign errors in writing at the time of filing the record and each error shall be separately alleged and particularly specified."

Rule 30 of this court.

"If the plaintiff in error shall fail to assign error, the writ of error shall be dismissed."

Rule 31 of this court.

All the other contentions here made relate to the alleged insufficiency of the evidence to support the verdict. It appears that the defendant is a Mexican, unable to speak the English language, and, despite the fact that there is no record here which entitles him to a review of this cause, out of an abundance of caution, lest one so handicapped might be the victim of injustice, we have carefully read all the evidence taken at the trial. So far from failing to support the verdict it convinces us beyond a reasonable doubt of defendant's guilt.

The judgment is accordingly affirmed.

Garrigues, C. J., and Teller, J., concur.

No. 9395.

COHEN v. THE PEOPLE.

1. **JURY—Drawing.** The clerk having called the sheriff to assist him in drawing a jury, the sheriff, instead of playing the part of an inspector, himself assumed the principal role in the ceremony, thrust his hand into the box, drawing the names therefrom and handing them to the clerk.

The drawing was an open and fair one, and the names of the jurors were drawn by chance. *Held* that the purpose of the statute was substantially accomplished; and counsel for the accused having witnessed the proceeding, and made no objection until the jury were empaneled, his motion to quash the panel was properly denied.

2. **CRIMINAL LAW—Assistant to District Attorney.** The District Court has inherent power to appoint an assistant to the District Attorney.

To constitute error in such appointment an abuse of discretion must affirmatively appear.

That the assistant is not appointed until after the jury were empaneled was made a ground of complaint by the accused, suggesting that by the late appointment he was prevented from interrogating the jury as to their acquaintance with and relationship to the assistant, that he might the more intelligently exercise his right of peremptory challenge. There being no attempt to show that the accused was in fact prejudiced, or even that he had exhausted his right of peremptory challenge, or exercised it in a single instance, the objection to the appointment was overruled.

3. **PRACTICE IN ERROR—Exception—When Necessary.** An exception to the appointment of an assistant to the District Attorney should be taken when such appointment is announced. To defer it until the record is made up waives the objection. Judgment affirmed on the authority of Mulligan against The People No. 9401.

Error to Adams District Court, Hon. H. S. Class, Judge.

Mr. O. N. HILTON, Mr. EDGAR McCOMB, Mr. CAESAR A. ROBERTS, and Mr. LESLIE M. ROBERTS, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. RALPH E. C. KERWIN, assistant, Hon. VICTOR E. KEYES, Attorney General, and Mr. WM. R. RAMSEY, assistant, for The People.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff in error was convicted of the robbery of Irene Nolan. He was both charged and convicted as a principal. It was the same transaction involved in the case of *People v. Mulligan*, determined at this term of court.

The indictment was returned by the same grand jury that returned the indictment in that case. The same objections as to irregularity and the same contentions made, that the record did not sufficiently show that the grand jury was sworn.

We have carefully studied the record in this case and find no errors of law occurring upon the trial. The statements of fact in that case are substantially identical with the facts in this case, and the testimony is not materially different, so that a restatement of either would be simply unnecessary repetition.

The judgment is affirmed.

Garrigues, C. J. and Denison, J. concur.

On Rehearing.

Scott, J. There were two assignments of error considered but not discussed in the opinion. These were errors on the part of the court in overruling the motion of the defendant to quash the panel of petit jurors, and second, in permitting an attorney to appear as assistant to the District Attorney in the prosecution, at the request of the latter. Counsel have so vigorously urged a consideration of these alleged errors in their briefs on rehearing, that we have concluded to treat of them.

1. The alleged error in the first instance is that jurors ordered by the court to be drawn from the box were not so drawn in conformity with the statute, and that the defendants were prejudiced thereby.

Upon this point, sec. 3680, Rev. Stat. 1908 provides:

"The clerk of the district court shall call to his assistance the sheriff of the county, and in the presence of the sheriff draw by chance from the compartment of the said box in which the names have been placed, a sufficient number of grand and petit jurors."

The facts appearing in this case from statements of counsel for defendants at the time, and from an affidavit of one of them, are: That the clerk called the sheriff to his assistance, but that the sheriff reached his hand in the box and took out the slips, one at a time, and handed each to the clerk, who wrote down the name appearing on each slip; that two of defendant's counsel were present all the time and observed the drawing. It is not suggested that the slips were not drawn by chance as the law provides, or that the drawing was not in any sense an open and fair one, as contemplated by the statute. The only criticism is that it was the sheriff's hand and not that of the clerk that drew the ballots from the box.

It is true that it is the duty of an officer to follow the requirements of the statute as the language seems to indicate, and that in this case the clerk should have drawn the slips with his own hand. But the drawing was by and in the presence of the two officers designated by the statute, and in addition to such requirement, the drawing was in the presence of two of defendant's counsel, who witnessed the drawing, and neither of them offer any criticism save and alone that the slips were drawn by one of the two officers lawfully designated and required to be present, instead of by the other.

The plain purpose of the statute is that the drawing of the names must be by chance, and that this must be witnessed by two officials named in the statute. In this instance, in the absence of any other suggested irregularity, this purpose was substantially accomplished.

It is true that in some states principally dependent upon statute, very strict technicality is observed in such matters, but we think that the just and true rule is as stated in 12 Enc. P. & P. 277:

"But notwithstanding these decisions the great weight of authority is to the effect that the mere fact that officers entrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced, or that injury has been sustained by reason of neglect or omissions charged. In brief, courts will not sanction a palpable disregard of essential statutory provisions nor overlook material departures therefrom, but if there is a substantial compliance with the statutes, mere irregularities in the procedure, or mere informalities on the part of the officers charged with the selection and drawing, will be deemed unimportant."

This seems to be the view of this court. *Gianv v. People*, 30 Colo. 20, 69 Pac. 504, where it was held that this provision of the statute was directory.

Indeed, the practice in this state has been to deal broadly with matters such as this and to take little heed of mere technicalities in the matter of the selection and qualification of jurors, where it does not appear that some substantial right has been denied. *Imboden v. People*, 40 Colo. 142, 90 Pac. 608. It does not appear in this case that the defendant was in any way prejudiced by the ruling of the court in denying the motion to quash the panel. The record discloses that counsel for defendant were present at all times and witnessed the drawing of names of the jurors and made no protest, objection or suggestion as to any irregularity in the method of drawing the names, but waited until the jury was empaneled, and then only moved to quash the panel. If it was a substantial error, they had the opportunity and it was within their power to have prevented it at the time, rather than to have acquiesced by their silence in what they now contend was a prejudicial error against their client.

If it was such error, they so consented, if not contributed to it, in violation of their duty to their client. It is clear that counsel knowingly permitted the irregularity. The overruling of defendant's motion was not error.

2. On the question of alleged error of the court in permitting or appointing an assistant prosecutor for the conduct of the trial, it has been held in this jurisdiction, and appears to be the general rule, in the absence of statute to the contrary, that the District Court has inherent power, in the exercise of a proper discretion to appoint counsel to assist the District Attorney in the prosecution of criminal cases, subject to review in the appellate court for the abuse of such discretion. *Board of County Commissioners v. Crump*, 18 Colo. App. 59, 70 Pac. 159.

The question is then, did the court abuse its discretion in the present case?

It appears that the District Attorney was at all times present and in control of the prosecution, and that the assistant selected was in fact an assistant, who did not assume control of the case in any of its phases.

In the discussion of the matter at the time, the District Attorney in open court said:

"I want it to be understood now that Mr. Sullivan is not the private counsel of any person, having any interest in this case, so far as I know, or any of the persons interested in the prosecution of this case, or knew anything about it until I had announced it in court."

This was not controverted, and it must be assumed that the assistant represented only the District Attorney in his public capacity, by and with the authority of the court. The objection urged here is that the assistant was selected after the trial was commenced, and that for such reason the defendant was necessarily prejudiced thereby. The argument is that the defendant was for this reason not permitted to question the jury as to their acquaintance and relationship with the assistant, to the end that he might thereby be the better enabled to exercise his right of peremptory challenge. There is no attempt to show that the defendant was in fact so prejudiced, but that he may have been. Neither does it appear that the defendant did exercise all or even any of the peremptory challenges permitted by the statute.

The record discloses the following proceedings in relation to the matter:

"AND THEREAFTER, and on, to-wit, the 14th day of March, A. D. 1918, all the parties being present in court, with eleven men in the jury box, the polling of the jury was continued until the jury was accepted. Whereupon, the jury was sworn to try the case, and after the opening statement by the District Attorney, evidence for the people was taken.

It appearing to the court that an assistant to the District Attorney was necessary and proper to be appointed to assist in the trial of the above entitled cause, and the District Attorney requesting that an assistant be appointed by the court in this cause, and the court finding that an assistant was necessary in this cause, it was ordered that James J. Sullivan, Esq., be appointed as assistant attorney to the District Attorney in the trial of the above entitled cause."

There was no objection or exception taken at the time, but later and after the arrival of the assistant attorney, and after further testimony had been taken, counsel for defendant suggested to the court that the appearance of the assistant be entered of record, and then objected to such appearance. The suggestion by the District Attorney of the appointment of the assistant and the concurrence of the court, constituted an appointment, and it was not necessary that the matter be entered as a matter of record. *People v. Walters*, 98 Calif. 138, 32 Pac. 864. The defendant therefore waived his right to except even if there was ground therefor.

The defendant at no time after the appointment of the assistant requested permission to re-examine the jury, nor does it appear that he would have exercised his right of peremptory challenge differently had he known of the appointment before the jury was empaneled.

The case of *State v. Cobby*, 128 Iowa 114, 103 N. W. 99, presents a state of facts precisely like the one in the case here. The jury had been sworn and testimony had been taken when the prosecuting attorney suggested the ap-

pointment of an assistant, which was ordered, and objection offered upon the same grounds as in this case. The court said:

"There is nothing in the statute prescribing the time within which, or the stage of the trial preceding which the county attorney must exercise the right given him. Nor do we think such a requirement can be said to exist in abstract reason. Quite to the contrary, it may happen, and, for that matter, does frequently happen that some matter of necessity arises during the trial of a criminal case which requires the appearance of an assistant attorney to prevent the annoyance, hazard, and expense incident to a discharge of the jury, and a new trial, or perhaps an entire failure of justice. It is not within reason to say, that, upon the mere happening of such an emergency, prejudice to the defendant may be presumed from the making of an appointment. It is true that in such cases a defendant, if advised in advance, might have differently exercised his peremptory challenges, but it is for him to make this appear to the court. It is for him to show prejudice where prejudice may not be presumed. Thus had he pointed out, in making his objection, or in his motion for new trial, that the relation between some one of the jurors and the attorney appearing was such that, in his (defendant's) discretion the juror would have been excused on peremptory challenge, the court might well refuse to make the appointment in the first instance, or possibly should grant a new trial after verdict. And an abuse of discretion on the part of the court might be taken by us as reversible error. Accepting such to be a proper view, it is manifest to our minds that a new trial should not be granted because of the chance or possibility, unsupported by even a bare assertion, that defendant might have desired to exercise a challenge, had the opportunity been given him."

Abuse of discretion by the court must affirmatively appear to constitute error in such a case. *State v. Elswood*, 15 Wash. 453, 46 Pac. 727; *State v. Hoshor*, 26 Wash. 643,

67 Pac. 386; *State v. Biggs*, 45 Mont. 400, 123 Pac. 310. There is no prejudicial error appearing in the appointment of an assistant to the District Attorney in this case.

Rehearing denied.

Department Two.

No. 9401.

MULLIGAN v. THE PEOPLE.

1. CRIMINAL LAW—*Grand Jury—Oath—Presumptions.* All presumptions are indulged in favor of the regularity of the impaneling of the Grand Jury.

Record construed to show that the Grand Jury was duly sworn.

2. RECORDS—*Amendment.* The Court has power to amend its record so as to make it speak the truth.

3. *Principal and Accessory.* An accessory may be charged and convicted as principal.

The statutory provision authorizing the punishment of an accessory as principal is not opposed to sec. 16 or sec. 25 of article II of the Constitution.

4. *Evidence.* Whatever is competent to determine the guilt of the principal is competent, for this purpose against the accessory.

A confession of the principal, though not made in the presence of the accessory is evidence against the accessory, but only to establish the guilt of the principal.

The state must show, either directly, or by conclusive circumstances that the accessory had knowledge of the principal's offense. This may be established as an inference from the facts and circumstances in evidence.

5. *Objections to Testimony.* Where there is no effort to confine such testimony to the guilt of the principal a mere objection that the testimony is hearsay, and no part of the *res gestae*, will not be regarded on error by the accessory.

Error to Adams District Court, Hon. H. S. Class, Judge.

Mr. M. B. WALDRON, Mr. JOHN W. GILLESPIE, Mr. GEO. Q. RICHMOND and Mr. WM. H. GABBERT, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. RALPH E. C. KERWIN, assistant, Hon. VICTOR E. KEYES, Attorney General, and Mr. WM. R. RAMSEY, Assistant, for The People.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff in error was convicted as an accessory in the robbery of one Irene Nolan. He was charged in the indictment as a principal, and as follows: "That Frank H. Mulligan on, to-wit, the second day of January, 1918, at the County of Adams and State of Colorado, did feloniously and violently take and steal one platinum ring set with one diamond about three karats, with three smaller diamonds on each side, of the value of twelve hundred dollars (\$1,200); and one platinum ring set with $2\frac{1}{4}$ karat diamond, with one 2 karat diamond on each side of the value of twelve hundred dollars; and one platinum ring set with four diamonds, two diamonds of about 1 karat each and two diamonds of about $\frac{3}{4}$ karat each, of the value of one thousand dollars (\$1,000) of the personal goods and chattels of Irene Nolan, from the person of said Irene Nolan, by force and intimidation; the said Frank H. Mulligan having then and there a confederate present armed with a dangerous weapon to-wit, a loaded revolver, which he then and there had and held, with intent, if resisted, to kill and maim said Irene Nolan."

The errors assigned and which seem important to consider, are:

1. That the defendant was indicted as a principal and convicted as an accessory. That if our statute upon that subject is capable of a construction that will permit such conviction, then the statute is in violation of certain provisions of the constitution.

2. That the grand jury which returned the indictment was not sworn as provided by law.

3. That the court admitted incompetent evidence, over the objection of the defendant, to his prejudice.

The robbery occurred at what is known as the "Model Road House," a few miles from the City of Denver, and in Adams county. This place was kept by one Jacob Feinberg. Mrs. Nolan in company with one Burke, a priest, came to the road house about two o'clock on the morning of January 2nd, 1918, and remained there occupying a separate room, but adjoining the main or bar room, eating and drinking until about six o'clock, when the robbery occurred. The circumstances of the robbery were that a man, identified by Father Burke and Mrs. Nolan, as Philip Cohen, and later convicted of the crime, came into the room occupied by Burke and Mrs. Nolan, who were seated at a table, and demanded and took from Mrs. Nolan the diamonds. These were obtained by the threats of the robber, who fired several shots into the floor. While doing this a mask which the robber wore fell from his face and the parties were from this circumstance enabled to afterward identify him. Burke and Nolan testify that some person whom they were not able to see or identify, and who was just outside the door, said to the robber as the latter went out the door, "Did you get the rocks?" The defendant was at the road house at the time, and had been drinking and shooting in the outer room shortly prior to the robbery. There was no direct testimony identifying him as being connected with the robbery. His acts and conduct, and other circumstances at the time of, before, and after the crime, were relied on for his conviction as an accessory, and if the testimony to which objection is urged, was properly admitted, these facts and circumstances were in our opinion sufficient to justify the verdict of the jury.

1. Upon the question as to whether the grand jury was sworn, it is not suggested by counsel that the lawful oath was not administered. The contention is that the record does not sufficiently disclose that the oath was administered.

The indictment itself recites, "The grand jurors chosen, selected and sworn, in and for the county of Adams, in the name and by the authority of the people of the state of Colorado, upon 'their oaths' present, etc."

The record of the court as of date of January 30th, 1918, is as follows: "At this time it is by the court ordered the roll call of grand Jurors be called and after excuses which were believed good and sufficient, the following were chosen to serve as Grand Jurors, to-wit: August Hattendorf, H. G. Newmaker, A. R. McCool, A. J. Vermazen, R. M. Cameron, John McDougal, G. F. Decatur, Parker Cline, Geo. H. Kidder, John H. Farmer, Jackson S. Cobb, Edward Mencimer.

It is now ordered G. F. Decatur be sworn as Foreman of the Grand Jury, and the remainder of the jury sworn to do its duty. Further ordered that A. M. Heineman be sworn to act as stenographer." The record further discloses that on a day, not stated, but after the verdict was returned, the following occurred in relation to the record in this particular: Mr. Johnson—We are ready to take up these two cases against Philip Cohen and Frank H. Mulligan on their motions for new trial. In reference to the record of the Grand Jury, your Honor made a statement that you would take that up and have it straightened out. The record shows that the Grand Jury was sworn, but perhaps it is a little indefinite and it should be shown. I ask that the record may be corrected to speak the truth in reference to the Grand Jury being sworn." * * *

The Court. "I have before me the records of this court, Volume 28, at page 63, wherein reference is made to the empaneling of a grand jury, and it appears from this record that the matter of the empaneling of the Grand Jury is not in accordance to the facts. The clerk is directed to make the record speak the truth in this; that the judge, himself, in open court, in this room, at the time the Grand Jury was empaneled, administered the oath to the foreman, which appears in Section 3699 under the title "Oath of Foreman," "Oath of Jurors," and in due form, according

to law, swore the foreman; and it was by reading the exact words as appears in the statute; and afterwards—immediately afterwards—each of the jurors were duly sworn by myself, according to law, and following the form set out in the section just enumerated. I think that is all that is necessary to be incorporated at this time.”

It thus appears from the original record, before the order for correction, that there was a roll call of the members of the grand jury, their respective names recited, orders that the foreman, naming him, be sworn, and that the remainder of the jury sworn, “to do its duty,” and that the stenographer, naming him, be sworn. While this record is brief and perhaps awkwardly written, we think under the authorities, it sufficiently shows that the grand jury was sworn as the law requires. No person of sound reason and judgment can read this record and have any reasonable doubt that the grand jury was duly sworn. But if we were to hold that the original record was not sufficiently plain to disclose the fact that the grand jury was sworn, then the court had the power to order the correction of the same so as to speak the truth, which was done.

This order was made at the same term, and while the cause was pending before the court. It was a matter peculiarly within the knowledge of the trial judge who personally administered the oath. What better and clearer showing could be made? The record is silent as to whether or not any additional showing was made. We have distinctly held that the court has such power. It was said in *Benedict v. The People*, 23 Colo. 126, 46 Pac. 637:

“The point is made that the defendant was not furnished, previous to, or at the time of, his arraignment, with a copy of the information and a list of the jurors and of the people’s witnesses, as the statute prescribes. As originally made up, the record does not affirmatively show that this requirement was observed. When, however, this imperfection in the record was called to its attention, the trial court, at the same term, and upon a showing made, ordered

the record to be amended to speak the truth in this respect. The record, as now before us, shows that the statute was fully complied with in the particular mentioned. The right of the court thus to amend its own records is unquestioned, and, for aught that appears, there was abundant evidence before the court to justify the order directing the amendment to be made."

There is no suggestion of fact in the record contrary to the finding and order of the court in the matter of the amendment. In fact the original record as made, clearly justifies the order of elaboration by the insertion of the minute detail.

But the record discloses that the defendant was arraigned and entered his plea to the indictment on the 16th day of February, 1918. This plea was not withdrawn nor was there an effort made to withdraw it. It appears that there was no motion to quash, or plea in abatement filed, and the first suggestion of irregularity in the indictment, was after verdict, and contained in the motion for a new trial. It has been held by the court that in the absence of a showing to the contrary, the presumption is that the proceedings were in favor of the regularity of the record. The rule in this respect stated in *Wilson v. People*, 3 Colo. 325, seems to have been since adhered to. It was there said: "Every reasonable intendment must be made in favor of the regularity of the record. The record asserts that the grand jury of twelve men were selected and chosen according to law, but as to the particular manner of selecting them, it does not speak. We are not permitted to presume, in the silence of the record, that the court adopted an illegal method in convening the grand jury. It is said in *Chase v. The State*, 46 Miss. 697: 'A grand jury was impaneled under the supervision of the court, and the presumption is not an unreasonable one, that a legal grand jury was organized according to law,' the record not showing to the contrary. Where it does not affirmatively appear that the grand jury is an unlawful body, any irregularity in selecting and impaneling it should in

general be raised before plea, by challenging the array, and not by a motion in arrest of judgment. Wharton's Crim. Law., Sec. 469, and cases cited; 1 Bishop's Crim. Pro., Sec. 887, and cases there cited."

In determining the sufficiency of the record to show that a grand jury was regularly empaneled and sworn, this court in *Parker v. People*, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803, said: "By the first assignment of error the regularity of the selection and impaneling of the grand jury finding the indictments is questioned. The only record which we have before us of the proceedings in the District Court is the one made out and filed in the Criminal Court at the time of the change of venue from the former to the latter. This record, after showing that the District Court was regularly in session at the time for the transaction of general business, the proper officers being present, contains the following entries in case No. 3, 173, and substantially the same entries in each of the other cases, to-wit: '*The People, etc. v. John R. Parker et al.*, 3, 173. Burglary, etc. Be it remembered that heretofore, and on to-wit, the 5th day of February, the same being one of the regular juridicial days of the January term of said court the following proceedings were had and entered of record in said cause, to-wit: At this day come the members of the grand jury, heretofore impaneled and sworn, and present to the court here the following true bills of indictment, to-wit: '*The People, etc. versus John R. Parker, George Cushman and Charles Wilbur*, 3, 173. Burglary and larceny." Indorsed: "A true bill." Frederick J. Burton, foreman of grand jury.'" It will be noted that this record is at least no more complete in matter of detail as to the fact of the grand jury being sworn than that of the case at bar, and the court said of it: "We have, however, in this record sufficient to show that the grand jury returning this indictment had been previously impaneled and sworn under the supervision of the court, and certainly the presumption is warranted that the grand jury was organized according to law, although the pre-

liminary record is not before us. *Wilson v. People*, 3 Colo. 328." The legal presumption is that all orders of the court made in the trial of a cause are complied with and if not, it rests with one raising the objection to show to the contrary.

2. That an accessory may be charged as a principal has been expressly determined by this court. In *Noble v. People*, 23 Colo. 9, 45 Pac. 376, the court quoted with approval the following from *Spies et al. v. People*, 122 Ill. 101, 12 N. E. 915, 3 Am. St. 320: "This statute abolishes the distinction between accessories before the fact and principals, by it all accessories before the fact are made principals. As the acts of the principal are thus made the acts of the accessory, the latter may be charged as having done the acts himself, and may be indicted and punished accordingly." And in *People v. Zobel*, 54 Colo. 284, 130 Pac. 837, it was said: "In this state an accessory is guilty the same as a principal, and may be indicted and punished as a principal." These declarations are sustained by reason and authority. If accessories are under the law deemed and considered as principals, then they are principals in so far as the indictment, trial and punishment are concerned. The authorities, where statutes similar to the Colorado statute are involved, seem to uniformly sustain the principle of those cited from this court.

It is urged, however, that if the statute is to be construed so as to permit the accused to be charged as a principal and convicted as an accessory, then it is in violation of section 16, art. II of the constitution which provides that the accused shall have the right to "demand the nature and cause of the accusation against him." Further, that it is in violation of section 25 of art. II which provides that "no person shall be deprived of life, liberty or property without due process of law." It is plain that if the first objection cannot be sustained, the other is without merit. No case is cited and we know of none, which in any sense sustains the contention, where the precise or similar question was raised. It is not and cannot be

reasonably questioned but that the indictment sufficiently charges the crime of robbery in case of principal. Our statute provides: "An accessory is he or she who stands by and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal and punished accordingly."

To say that an accessory is deemed and considered as principal, and to be punished as a principal, is to plainly declare that he shall be charged as a principal. All participants in the crime are made alike guilty of the crime under the statute, and therefore when properly charged with the crime, they are sufficiently advised of the accusation against them, within the requirement of the constitutional provision.

3. It is earnestly contended that testimony of witnesses Rose and Feinberg, concerning conversations with Philip Cohen, involving admissions and acts tending to establish guilt, both upon the part of Cohen and Mulligan, made after the robbery, and in the absence of Mulligan, admitted over the objection of the defendant, constitutes vital error and of itself requires a reversal of the judgment. Cohen was charged and convicted at a later date, but at the same term of court, of the identical offense, and as the principal in the perpetration of the crime. The defendant Mulligan was convicted upon the theory that he was an accessory to Cohen, in the commission of the offense. The argument is that the defendant Mulligan was charged separately, and as a principal; that there is no charge of conspiracy, and that therefore the conduct and conversations of Cohen not made in the presence of Mulligan, is incompetent and prejudicial. It appears that the robbery occurred on the morning of the 2nd of January, and the jewels were returned from a jeweler, by express, for delivery to the owner, about the 23rd or 24th day of the same month. These conversations with, and the acts and conduct of Cohen, Mulligan and the witness Feinberg, had

to do with securing the return of the jewels and clearly tended to establish the guilt of the defendant, so that if the testimony was erroneously admitted, the judgment should be reversed.

It is argued that the conversations between the witness Rose and Cohen occurred at least ten days after the crime was committed, and some of them at least, after the return of the diamonds, hence they were not only hearsay but were not a part of the *res gestae*. The argument of the attorney general is that the return of the jewels was a final disposition of the stolen goods, and until that occurred the words and acts of the defendant or either of them was a part of the *res gestae*, and therefore admissible in evidence. The defendant was tried as an accessory and whatever evidence is competent to determine the guilt of the principal is competent upon the trial of the accessory. While the accessory may under the statute be tried and convicted, independent of the conviction of the principal, yet before the conviction of the accessory may be permitted, the jury must find that the principal was guilty of the crime, and this must be determined under the rule of reasonable doubt. In this respect there has been no departure under our statute, from the rule of the common law. It was said by Chief Justice John Marshall in the case of *U. S. v. Burr*, 4 Cranch 469: "It is a settled principle in the law that the accessory cannot be guilty of a greater offense than his principal." The maxim is *accessorius sequitur naturam sui principalis*; the accessory follows the nature of his principal. This principle has been recognized in *Trozso v. People*, 51 Colo. 323-337, 117 Pac. 150.

The rule of law we are discussing is stated in 16 C. J. 146, and appears to be amply sustained by authority: "In order to warrant the conviction of an accessory, the guilt of the principal must be established to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt."

It was said upon this point in *Turner v. State*, 124 Ga. 31, 52 S. E. 1, that: "Upon the trial of one charged as an accessory before the fact it is incumbent upon the state to prove the guilt of the person charged as a principal, beyond a reasonable doubt. The record of the conviction of the principal is conclusive evidence as to the fact of his conviction, and is prima facie evidence of his guilt. The fact that the state introduces the record in evidence does not preclude the introduction of other evidence tending to establish the guilt of the principal. Therefore, as a general rule, in the trial of an accessory any evidence which would be admissible against a principal if he were on trial, is admissible on the trial of an accessory for the purpose of establishing the guilt of the principal."

The rule as to confessions of guilt by the principal, not made in the presence of the defendant accessory, who alone is being tried, is that such confessions or admissions are admissible, but for the purpose of establishing the guilt of the principal, a necessary prerequisite before the accessory may be convicted at all, but that such confessions must be limited by the court in a charge to the jury, to the question of guilt of the principal alone. The rule in this respect is stated in 16 C. J., 146 to be: "In the majority of cases, however, which seem to be supported by the better reasoning, the broad rule is laid down that on the trial of the accessory, confessions and admissions on the part of the principal are admissible to prove the principal's guilt, provided the effect thereof is expressly limited to that object."

In a very exhaustive and instructive opinion by Judge Ramsey, in *Gibson v. State*, 53 Tex. Crim. Rep. 349, 110 S. W. 41, this distinction is clearly pointed out.

But not only was there no evidence of a confession of guilt by the principal, nor by any alleged accessory, in the case at bar, but there was no objection or motion by defendant's counsel seeking an instruction of the court to the jury, confining the testimony of the witnesses to the guilt of Cohen, alone, as principal. The objection went only to the admis-

sion of the evidence for any purpose on the ground that it was incompetent as being hearsay and not a part of the *res gestae*.

In the Gibson case, the defendant was charged in two counts, one as principal, and the other as an accessory in the commission of the same offense, and the court said at page 366: "If Middleton had been on trial, his detailed confession made to Holman would have been admissible in evidence against him, and was therefore admissible evidence in this case to prove his guilt as principal in the murder of Black, but not to prove that the defendant was an accomplice in that murder, or had any guilty connection with it. It was not error, we think, to admit the testimony of the witness Holman, detailing the confession of Middleton. In the charge to the jury, the purpose for which this testimony was admitted was clearly explained to the jury, accompanied by the emphatic instruction that it could not be considered against the defendant for any purpose, but could only be considered for the purpose of showing that Middleton may have killed Black. These remarks were applicable also to the testimony of the witness Christopher, detailing Middleton's confession made to him of the murder of Black. *Simms v. State*, 10 Tex. Crim. App. 131. These cases were ample authority for and in every respect sustain the action of the trial court. In this case there was no motion to require an election on the part of the State. As the case stood, in the absence of such motion to require an election, a conviction might have been had either as a principal in the murder, as an accessory or as an accomplice. Any testimony that legitimately tended to establish the guilt of the appellant under either of the counts was admissible, and where, as in this case, the jury were in terms instructed that the testimony which was admissible under the charge against appellant as an accessory, could not be considered as proof of his guilt, we can see no possible ground of complaint on the part of appellant." It is true that a conspiracy was not charged, and therefore the rule of evidence applicable to the admissions of co-conspirators as against

each other on separate trial is not involved, and for such reason the case of *Smith v. The People*, 38 Colo. 509, 88 Pac. 453, is not in point. Conspiracy is not charged in the indictment and was not attempted to be proven in the case at the trial.

The case here is as to the guilt or innocence of the defendant as an accessory. The rule of evidence includes as before stated, in this character of case, the admission of all proper evidence to establish the guilt of the principal beyond a reasonable doubt, but that if it include an admission or confession of guilt upon the part of the principal, the court must charge the jury that such admission or confession does not bind the accessory. In this case the principal did not testify at all, and no witness testified as to any admission or confession of guilt upon his part.

In the trial of an alleged accessory, the state must show also by some substantial proof, either directly or by conclusive circumstances, that the accessory had some knowledge of the principal's offense. But it is not necessary that the state should prove that there was an agreement in words or writing, between the principal and the accessory to commit the offense. This may be established as an inference from other facts and circumstances proved. Whether or not the testimony is sufficient to justify a conviction is for the jury.

In relation to the question as to whether or not the testimony to which objection was made, did or did not form a part of the *res gestae*, we are unable to see its applicability in this case.

The testimony of Mrs. Rose to which exception is taken, which in any sense seems to be material is, that she was a chorus girl; that Cohen frequented her apartments; that she did not meet Mulligan until after the robbery; that within a few days afterward he came to her apartment to find Cohen, and that Mulligan and Cohen were afterward in her apartment together; that the robbery was referred to frequently between she and Cohen, and that she accused Cohen of being guilty of it. That in her apartment Cohen, when Mulligan was present, referring to Mulligan, she testified:

Q. "Well, what was said, as near as you can remember?
A. Well, I heard him tell Phil that he wasn't afraid of Feinberg, because he wasn't afraid that he was going to "squeal" or say anything. Just a word now and then. I didn't pay any attention to what they had to say.

Q. Did you understand what they were talking about?
A. Well, I had a good idea."

Concerning another meeting of Cohen and Mulligan, in her apartment, she testified:

Q. "Do you remember whether or not Mr. Mulligan was present after he came back? A. Mulligan came up—he wanted to meet Phil Cohen at five o'clock. The hours they met in my room had to be five or eleven, on account of my working hours. So Phil's train must have been late, and he didn't get in. I told Mulligan I would leave the key down stairs, and I left a note, and I put 'M' on for 'Mulligan', leaving the key down stairs. They were there when I got home.

Q. When you got home—was that after the last show, about eleven? A. Yes, sir.

Q. Did you hear any talk at all between them after you got home about what had taken place? A. Why, yes, I heard Cohen say something about the Grand Jury, and what they had said; but I don't know just exactly what his statement was.

Q. Not exactly, but can you give me generally? A. He just said, "They are trying to make me the "goat", is what Phil said.

Q. What did Mulligan say? A. I didn't hear him say anything. I guess he did say something, but I don't know what he said."

Certainly this testimony is not subject to objection for any reason. The specific testimony by Mrs. Rose, set out in the brief as being prejudicial to the defendant Mulligan, is in substance as follows:

"How long was it after the hold-up before you ever spoke to Cohen about it? A. Well, I spoke to him every day about it.

Q. Every day beginning how soon after the hold-up?

A. Oh, about ten days, I should judge.

Q. Was that before the 'diamonds you heard—the diamonds were returned? A. That was before.

Q. What did Mr. Cohen say to you when you asked him about it? A. Well, Mr. Johnson, you understand that Cohen did not tell me anything about the diamonds until after they had been returned.

Q. I understood you to say that you had a conversation with him before that time, when you saw him around with Mulligan? A. No, I merely asked him questions, I accused him of the robbery, of being in the robbery, and one thing and another.

Q. When you said that to Mr. Cohen, what did he say in reply to it, speaking about the first time, if anything?

A. Oh, sure, I am the man, he said. Everybody on the market thinks I did it, too. My conversation that I held with Cohen you will understand, was after the diamonds were sent back.

Q. You mean the conversation in which he described in detail? A. Yes, sir, that is what I mean.

Q. Well, was that after you heard they were returned, or how do you fix that? A. After they were returned, after I heard they were returned, then he told me the details.

Q. Do you remember any conversation with Mr. Cohen about there being some negotiations going on between Mr. Cohen and others to have these diamonds returned? A. I did not hear anything about it before they were returned, no, nothing.

Q. Didn't you hear the name of Feinberg mentioned? A. No.

Q. All these matters that you have testified to here were after Mr. Mulligan had been arrested? A. Yes, I do. I remember Phil came to my room, and he had left his old hat at my room and he told me—and he said, 'I am going to the Springs to see about putting in a new store there, and, he says, 'I am going to drive the car; let me have my old

hat.' I took the old hat and placed it in the suitcase. He came back shortly. He said, 'I decided not to take the store; it was too much rent.' "

In all this testimony there does not appear to be a word or act reflecting on Mulligan at any time when he was not present. If it had application it was to Cohen alone, and was competent. The guilt of Cohen was necessary to be established on the trial.

In order to consider the alleged incompetent testimony of Feinberg, the proprietor of the roadhouse, it seems important to refer to some of his evidence to which specific objection in the briefs is made.

He testified that Mulligan, the defendant, who was a city detective, came to the roadhouse about one thirty o'clock in the morning with a party of others in an automobile; that Mulligan was drinking and fired shots in the bar room. That he, Feinberg, left the place for the city with waiters and entertainers, at about five fifteen o'clock, and invited Mulligan to go with them but who declined for the reason that he would not ride with "niggers", and that they left Mulligan lying on a bench. That Burke and Mrs. Nolan were still in the small dining room, and two or three of the help still remained at the roadhouse.

He says that after the robbery he, Cohen and Mulligan met every day or every other day. That upon one occasion Mulligan drove him out to the end of a car line where he had an appointment to meet Cohen—that Cohen was at the designated place when they arrived. That on the same day he asked Mulligan if he knew anything about the diamonds and who replied that he did not. Mulligan said, "Why don't you go and see Cohen and 'Dip' and see if they know anything about it." I did see Cohen next morning out at "the end of the prairie." It was about five o'clock the same evening when he and Mulligan met Cohen at the end of the car line.

At this meeting witness said to Cohen that he wanted to get the stuff—Cohen said he thought he knew where to go and get it. I told him they would get immunity if they would get it and he told me he would talk to this party, and

he thought it would take about a hundred dollars to get it, and said there must be no publicity and the diamonds will be returned. I told him I did not want to know who did the holding up. He said I think the stuff can be gotten back if there would be no prosecution, no publicity, and nobody know when the diamonds would come back.

When I told Mulligan that if the diamonds could be "blowed back" his prosecuting witness might fail to identify anybody, he said "it would keep us out of trouble." The witnesses, Mulligan, Cohen, Sidney Evans, "Dip" Evans, and "Chalk" had at the time, all been arrested for the crime. Feinberg further testified that he gave Cohen three different addresses, where the diamonds could be returned. The diamonds, it appears, were returned to one of these addresses by express from Pueblo—Witness gave Cohen ninety dollars to get the stuff "blowed back."

The above is the substance of the testimony of Feinberg, to which objection was made. Plainly it was competent as against Cohen, and therefore admissible.

We find no error in the admission of the testimony of the witnesses Rose and Feinberg.

Counsel in their brief say: "It will be noted from an examination of the record that the conversations between these witnesses, Rose and Feinberg, with Philip Cohen, relative to the robbery and the diamonds which were obtained as a result thereof, were all prior to the disposition of the diamonds by the robber." We are unable to see what difference it can make in this case when these conversations took place, as related to the time when the diamonds were returned. The charge was robbery, and the crime of robbery was complete when the diamonds were taken, regardless as to whether or not they were ever returned. Any proper evidence tending to prove the guilt of the defendant is not to be excluded because of the time of an after occurrence tending to show guilt, but not connected with the immediate perpetration of the crime.

It is argued that there is not sufficient testimony in the case to justify the jury in connecting the defendant with

the established crime. The testimony so far referred to, is but a part of the showing made by the people, and it is not our purpose to refer to much of it, except to express the opinion that upon the whole, the evidence was sufficient to submit the question of guilt or innocence to the jury. But the following detailed circumstance is one among others tending to establish the guilt of defendant. It will be remembered that Mulligan arrived at the roadhouse about one thirty in the morning. The following is the substance of the testimony of one J. H. Cordillo: "Name is J. H. Cordillo, reside at 1316 Elati street, Denver; have charge of the prohibition department for the State; have known Frank Mulligan for the last six or eight years; been around him for the last fourteen or fifteen months; business required me to be at City Hall; was at Model Roadhouse January 2nd, arrived there a little after three o'clock—about three thirty; Mulligan and another party went with me; other party drove the car and wore a brown overcoat; the collar was up; he had on a black, soft Fedora hat, creased in the center; did not speak with him; just before going there was at home; somebody rapped at the door a little before three o'clock; my wife went to the door; later I went and met Frank Mulligan; he came in. He said to me when he came in, 'hurry up and get your clothes on right away. There's a whole load of booze out to the Model. I just came from there; let's go and get it.' I told him to wait in the front room, and he followed me through the dining room, and I went in the bed room and sat at the foot of the bed. He kept walking back and forth, and he kept saying, 'Hurry up. You are too slow.' I dressed, put my shoes on, and he says to me, 'Well, now, hurry up, or it will be too late.' And I hardly had time to lace my shoes. We went out and got in the car; the man whose clothes I have described drove the car; Mulligan and I sat in the back end of the car. On the way going out there, as this fellow was driving the car, Mulligan kept telling him, 'Can't you make more speed? Step on her.' First I thought he mentioned a fellow's name—'Chalk'. He might have said 'Chalk'. I didn't pay much

attention to the name. As we got to the crossing, where the Burlington crosses the Brighton road, he says to me, 'Father Burke and Mrs. Nolan are out there, and they are drunk. I didn't pay much attention to that. We went a little bit farther, and he repeated the same statement. Just before we got to the place, as we crossed the Union Pacific tracks, that is, between the Model and the Sand Creek bridge, he suggested to me that I should go in and 'Pinch' the place.

Q. What did he say to you? A. 'Now, you go in.' he says, 'and 'pinch' the place, and there's a party that will do the 'squaring' and we will get the 'rocks.'

Q. Had he said anything about 'rocks' before that? A. If I recollect right, I believe he did. He said that Father Burke and Mrs. Nolan were covered with 'rocks' when he first mentioned Mrs. Nolan. * * * This fellow, whoever he was, driving the car, turned around and drove practically parallel with the building; the driver of the car, whoever he was, jumped out of the car and went in the front door where the bar room is; Mulligan went in the side door on the north side of the building, underneath the stairway, which leads into a wine room, I believe it is; and I went out and searched this car that was across the street, thinking there was a load of booze there yet. I went back towards the back end of the building, and I heard Feinberg and Mulligan talking at the rear. The only word I could understand was who said it, I don't know, 'Oh, damn you, you're crazy,' or something like that, and he walked out the side gate and walked towards me. He says, 'Hello there.' I says, 'Hello, Jake.' He says, 'damn it, that God damned fool is crazy. He's drunk.' This conversation was with Feinberg after he had left Mulligan; Mulligan had gone back into the building again; did not see Mulligan again that evening; did not go into the place; I came back to Denver with one of the Evanses; I couldn't say which one it was. I got back to Denver about four o'clock."

And on cross-examination:

Q. Was Mulligan drunk? A. Well, he had been drinking, yes.

Q. Was he under the influence of liquor when he was talking to you? A. Well, not so awful much. He had been drinking. I don't know how much he had been drinking. You could smell it on him and tell from his actions. * * * He didn't tell me until we got right near the place to 'pinch' the place. I did not 'pinch' the place. Just as I was leaving I heard two shots fired in the building somewhere, just after we hit the main road. I came back with Evans—I don't know what his name is—John or 'Dip'. It is the fellow that acted as chauffeur. Jake Feinberg told him to take me in. I asked Feinberg to get me away from there. There was five automobiles out there. I did not search all five. I did not tell anybody about this affair until Chief Armstrong called me into his office a few days after it occurred."

We find no errors of law occurring upon the trial and the judgment is therefore affirmed.

Judgment affirmed.

En banc.

Teller, J. and Bailey, J. dissenting.

No. 9613.

FORT LYON CANAL CO. v. NATIONAL SUGAR MFG. CO. ET AL.

IRRIGATION—*Adjudication—Who May Assail—Statute Construed.*

The phrase "any party or parties feeling aggrieved" as used in sec. 3315 of the Revised Statutes does not include appropriators in another water district, who are not parties to the adjudication.

Parties aggrieved by such decree may obtain relief by pursuing the provisions of Rev. Stats., sec. 3313.

Department Three.

(Burke, J., sitting for Allen, J., and Denison, J., sitting for Bailey, J.)

*Error to Pueblo District Court; Hon. Samuel D. Trimble,
Judge.*

Messrs. HILLYER AND KINCAID and Mr. WM. H. GABBERT,
for plaintiff in error.

Messrs. DUBBS & VIDAL, Messrs. HARTMAN & BALLREICH
and Mr. JOHN H. VOORHEES, for defendants in error.

Mr. Justice Burke delivered the opinion of the court.

NOVEMBER 25, 1916, there was filed in the office of the Clerk of the District Court of Pueblo County a final decree in a certain statutory proceeding for the adjudication of priorities of water rights for irrigation in water district No. 14 wherein *inter alia* Lake Henry Reservoir, owned by one of defendants in error, was decreed priority No. 10 as of 1891 and Lake Meredith Reservoir, owned by the other, priority No. 11 as of March 9, 1898. November 21, 1918, plaintiff in error filed therein its petition for a review and re-hearing of said decree, "with additional testimony." It is alleged therein that petitioner is the owner of certain adjudicated water rights in water district No. 17, and the owner and claimant of others therein unadjudicated, all within the jurisdiction of the District Court of Bent County, and that petitioner was not a party to said adjudication in water district No. 14. Such further facts are set forth as would entitle plaintiff in error to the relief demanded were its water rights in water district No. 14, and subject to adjudication in the District Court of Pueblo County. The petition of plaintiff in error was set for hearing January 27, 1919. Prior to that date both defendants moved to quash the order and service of notice, and dismiss the petition for want of jurisdiction. April 10, 1919, said motions were sustained and from that judgment this writ is prosecuted. All of the water rights here involved are located in the general drainage area of the Arkansas river. For the purpose of statutory adjudications the District Court of Bent County has exclusive jurisdiction in water district No. 17 and the District Court of Pueblo County in water district No. 14.

Burke, J., after stating the facts as above.

Plaintiff in error claims a hearing and relief under Sec. 3318, R. S., 1908, which reads: "The district court, or judge thereof in vacation, shall have power to order, for good cause shown and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no such review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of." The sole question requiring our consideration is whether the language "any party or parties feeling aggrieved," as used in said section, should be construed to include claimants in another water district who were not parties to the adjudication.

The words "party aggrieved" may have different meanings depending entirely upon the connection in which they are used. The interpretation given them in one connection may throw no light upon their meaning as used in another. We confine ourselves therefore solely to the meaning of the language in question as used in this particular section of our adjudication statutes.

It is a cardinal rule of statutory construction that in case of ambiguity the intent of the legislature is to be determined from the entire body of the statute. Sec. 3318, *supra*, is one of the sections relating to the subject of adjudication of priorities of right to the use of water for irrigation, a subject which is covered by sections 3276 to 3320, both inclusive, R. S., 1908. Sixteen of these sections contain language expressly limiting their operation to claimants in the particular water district in which the adjudication is had. Others are unmistakably so limited by implication. No one of these sections contains express language permitting a claimant outside of the district to participate in any respect in the adjudication. It thus appearing that

these adjudication statutes are limited in their application to claimants in the particular water district wherein the proceeding is brought, had it been the intention of the legislature to extend the operation of any section of the act to claimants outside said district, that intention would have been made expressly to appear and not been left to implication or inference.

The identical question here under consideration has not heretofore been before this court for determination. The most that can be said is that side lights are thrown upon it by the following excerpts: "The decrees are *res judicata* between those who were parties to, or participated in, the proceeding in which such decrees were rendered, * * *. Ample provision is made for the protection of the rights of parties to proceedings in the same district, but none of the provisions relating to this class relate to appropriators in different districts, as between each other. * * * In order to protect their rights, as between each other, a period was given within which actions might be instituted to settle and adjust such rights. * * * Parties to adjudication proceedings in one district are bound to take notice of the rights adjudicated in other districts * * * unless an independent action is commenced and prosecuted to judgment, the rights of appropriators in different districts will not be settled in a common forum, * * *. It is also urged that, because parties claiming rights to the use of water outside of the district in which adjudication proceedings are had may not participate in such proceedings, therefore the statutes in question (four year limitation, sections 3313, 3314, R. S., 1908), must be limited to parties in the same water district. Instead of this being an argument in favor of such construction, we think it but strengthens the conclusion, that these sections were intended to protect the rights of parties claiming water from the same source in different water districts if they saw fit, within the time prescribed, to assert their rights by some appropriate action. Such a provision was necessary to protect the rights of claimants to water in different districts because they could

not be heard in a common forum, in a statutory adjudication." *Fort Lyon Canal Co. et al. v. A. V. S. B. & I. L. Co. et al.*, 39 Colo. 332, 90 Pac. 1023.

"No provision is made for those owning lands situate outside of the district to be made parties to the (adjudication) proceeding, although one and the same stream may be relied upon as the common source of supply, and the different interests may for this reason be antagonistic. * * * The act does not attempt to make such decrees conclusive as between the various districts, but, in effect, it provides that until the courts shall determine otherwise in some appropriate proceeding, the superintendent shall treat the decrees as *prima facie* correct and distribute water accordingly. * * * Undoubtedly the owners of priorities in one water district may by appropriate pleadings challenge the correctness of decrees entered in other water districts, where the rights of the former are unjustly affected thereby, * * *." *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 Pac. 444, 55 Am. St. 149.

"The statutory proceeding to adjudicate priorities of right to the use of water, * * * is not an ordinary civil action or proceeding; it is a proceeding *sui generis*, to which the rules governing ordinary civil actions are not always applicable. * * * The irrigation acts * * * provide for determining priority of appropriation of water for irrigation purposes between ditch companies *within the same water district* * * *. The irrigation acts provide for a separate adjudication of priorities for each irrigation district, but not for the settling of priorities beyond the limits of the district. * * * The division of an irrigation district before the final adjudication of priorities therein, * * * does affect the jurisdiction of the court * * *. The objection that petitioner is liable to have its rights interfered with by reason of the fact that its claims to priority can not be considered, compared and adjudged in connection with the claims of those having ditches farther up the Platte river in Irrigation District No. 1, is

doubtless a matter of some importance; but the same objection is liable to arise wherever the same natural stream includes different water districts, as was the case with several of the original districts. For such injuries some remedy must be sought other than the statutory adjudication of priorities, * * *." *Sterling Irrigation Co. v. Downer*, 19 Colo. 595, 36 Pac. 787.

"It is true * * * the act * * * limits the review or re-argument of such decrees to the period of two years from their entry; * * *. But these sections do not apply to an original proceeding for an adjudication of priorities by a party who has never had his day in court. A re-argument implies a previous argument, or at least a previous opportunity for argument. No one's interests can properly be said to be affected by a decree in a proceeding of this kind to which he is not a party." *Nichols v. McIntosh et al.*, 19 Colo. 22, 34 Pac. 278.

These excerpts, while not controlling, clearly indicate that this court has heretofore assumed that claimants outside of the particular district in which the adjudication is brought could not become parties thereto, or be heard therein either before or after decree.

The action is a purely statutory proceeding and no claimant can be made a party thereto or be heard therein except upon statutory authority, and none such exists except it can be found by implication in sec. 3318. In a statutory proceeding limited to intra-district claims inter-district disputes can not be heard or adjudicated.

It is undisputed that plaintiff in error could, under no conceivable circumstances, have been made a party to the present proceeding or been heard therein prior to decree. Certainly it can not back in after decree but by express statutory authority, and a statute which permitted it to do so would be an anomaly in the law. Its petition alleges that this decree in water district No. 14 infringes its rights as adjudicated and claimed in water district No. 17. How can the District Court of Pueblo County, which has no jurisdiction to pass upon water rights in water district No. 17, hear such a claim?

The re-argument and review provided for by the statute in question may be either with or without additional evidence, and in either case its application to claimants outside the district is equally inconsistent and illogical. No evidence as to such claims could be admitted in the proceeding prior to decree and the District Court of Pueblo County could no more entertain an argument without evidence to support it than it could admit evidence with no jurisdiction to determine any fact established thereby. It could not determine that its decree theretofore entered infringed petitioner's rights without judicially ascertaining those rights. The latter question being beyond its jurisdiction it follows that the former must be. If one claimant from water district No. 17 can thus back into an adjudication proceeding in water district No. 14, all the claimants in No. 17 may do so and the resulting confusion and complication would be limitless. Sec. 3314, R. S. 1908, provides: "After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree." And petitioner contends that certain of its rights having been heretofore adjudicated in water district No. 17, against which decree this statute has run, its admission into the present proceeding involves neither the necessity nor possibility of further judicial determination as to such rights. The contention is without merit because if petitioner can come into this adjudication at all it can do so before the running of the statute while its decree would for the same reason be subject to a like attack by defendants in the District Court of Bent County.

The trial court held that as petitioner was not a party to the adjudication in water district No. 14 the decree which it seeks to attack is not *res adjudicata* as to it, and petitioner urges that, tested by the provisions of said section

3314, this ruling is erroneous. It is true that petitioner will, under the provisions of said section, be barred after the lapse of four years, but it will be barred by the statute of limitations, not by the decree alone.

If the decree entered in the instant case, wherein plaintiff was not and could not be heard, infringes its rights as alleged nothing is more certain than that a remedy exists for such infringement. That remedy has been specifically provided for. "Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed, save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order. Sec. 3313, R. S. 1908.

Answering this suggestion plaintiff says it can not seek relief in equity under this statute because sec. 3318, *supra*, affords it a plain, speedy and adequate remedy. Whether

said sec. 3318, affords plaintiff any remedy is the point in dispute and this argument, which assumes that it does so, merely begs the question.

The conclusion is inevitable that the language "any party or parties feeling themselves aggrieved" has no application to claimants of water rights outside the water district in which the adjudication is had.

The judgment is accordingly affirmed.

Garrigues, C. J. and Denison, J., concur.

No. 9628.

DALTON v. THE PEOPLE.

1. **CRIMINAL LAW—Evidence.** Indictment for Criminal Conspiracy. Conversations had while the conspiracy is in progress are admissible.
2. **HUSBAND AND WIFE** may conspire to commit a criminal offense.
3. *Privileged Communications.* A letter written by a woman convict to her husband, touching an alleged conspiracy, is not, without the wife's consent, admissible against another accused of participation in the same offense.
Objecting to a copy of the letter is not a waiver of the wife's privilege.
4. *Hearsay.* Statement of the husband to the District Attorney upon exhibiting the letter, as to a part thereof not exhibited, is hearsay and not admissible.
5. *Unauthorized Disclosure,* by the husband does not waive the wife's privilege.
6. **CONSPIRACY—Evidence.** Defendant was charged with a conspiracy to steal an automobile. He had taken the car in Sterling and driven it to Julesburg. An instruction requiring that in order to convict the jury must believe that this removal of the car was in pursuance of the conspiracy held properly refused.

*Error to Logan District Court, Hon. L. C. Stephenson,
Judge.*

Department Two.

Messrs. COEN & SAUTER and Messrs. MUNSON & MUNSON, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and CHARLES ROACH, Deputy, for The People.

Mr. Justice Denison delivered the opinion of the court.

JAMES DALTON was convicted of conspiracy with Olive Dalton, his wife, and one Mrs. Rose, to steal an automobile of one Harris. He secured a separate trial. Mrs. Rose, who had pleaded guilty to the same charge, was brought from the penitentiary and was the principal witness against him.

The only points made by plaintiff in error which it is necessary to notice are as follows:

1. It is claimed that the court improperly permitted the witness, Mrs. Rose, to relate conversations between herself and Mrs. Dalton which occurred after the consummation of the conspiracy. No such testimony was admitted. The car was taken by Dalton in Sterling, and driven by him to Julesburg and left in a garage. He returned to Sterling, gave the claim check to Mrs. Rose who went to Julesburg and took the car to Holyoke for sale. The conversation to which the defense objected took place between Dalton's return to Sterling and Mrs. Rose's trip to Julesburg and Holyoke, all of which was in furtherance of the conspiracy. 2 Whar. Crim. Ev. 10th Ed., § 699, 12 Cyc., p. 488.

2. R. R. Rose, husband of Mrs. Rose, was a witness for defense. The defense offered to identify by him and by other testimony, and to put in evidence a copy of a part of a letter from her to him, written in the penitentiary, in which she purported to relate the facts of the taking of the automobile different in some respects from what she had stated on the stand. The letter had been destroyed by the husband after it had been shown by him to Mr. Coen, one of the attorneys for the defense, and he, Coen, had been permitted to make the copy offered in evidence. The prose-

cution objected *inter alia* on the ground that the letter was a communication from a wife to her husband, and so privileged.

We think the objection is sound. The question before the court was two-fold: (a) Whether the husband, without the wife's consent, could testify to the contents of the letter (or to the correctness of the copy which would be the same thing); (b) Whether even the original letter, if it had been present, would have been admissible.

Under our statute it is clear that the first question must be answered in the negative. "Nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during the marriage." R. S. 1908, § 7274.

The rule expressed in the above quotation is not restricted to cases where husband or wife is a party, because such cases are already provided for in the previous part of the same sentence, and because the rule forbidding husband and wife to testify against each other is entirely distinct and has nothing in common with the rule granting the privilege to communications between husband and wife. Wig. Ev., §§ 600, 2228, 2333-4.

The testimony, therefore, of Rose on the subject of this letter was properly rejected, and since no other competent evidence was offered as to its genuineness, we cannot see that there was error in rejecting it. Apart from this question, however, we are of the opinion that the letter itself was privileged, and that without Mrs. Rose's consent it could not be admitted.

The defense argues that the wife, Mrs. Rose, waived her privilege, because, being called before the court and asked whether she was willing to waive it, she said she would not object to the original letter but did object to the copy. This raises a question upon which we are favored with no citation of authority, but her action amounted to a refusal, the reason for which was that the original was not available. Upon principle it would seem that she might refuse for any reason or no reason. We see no waiver here.

It is also urged that in that part of the letter that was not copied she requested or authorized her husband to show the letter to the attorney for the defense, which would constitute a waiver. We do not find that this request is shown in the record or included in the offer of proof made by counsel for the prisoner when this point was before the court. His offer was to show by witness Coen that the witness R. R. Rose brought the letter to Coen and "stated" to Coen "that he brought the letter to the witness Coen at a suggestion contained in the letter on the other page of the letter." This was hearsay, and therefore not competent to show the request. The unauthorized disclosure of the letter by the addressee does not waive the writer's privilege. The disclosure to Coen by Rose is not shown to have been authorized so for this second reason it was not error to reject the letter. Wig. Ev., § 2339 (2).

In *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. 572, cited by the defense, the disclosure of the letter was by him who was claiming the privilege, so that case is not in point.

3. The court gave the following instruction: "The gist of the offense of larceny is the unlawful intent, and before you can convict in this case you must find from the evidence in this case beyond a reasonable doubt that the defendant entered into a conspiracy with his co-defendants, or one of them, to steal the car described in the information." This was excepted to because it authorized the jury to convict defendant for a conspiracy with his wife alone. The prosecution, however, claims that the married women's acts of this State have removed the reason for the common law rule that man and wife cannot conspire, which was because they are one person. We think this position sound. The proposition that man and wife are so literally one person that they cannot agree with each other to commit a crime is as discordant with the present policy and tendency of our laws as it was harmonious with the older laws of England.

There were two reasons on which the proposition was based, First: that man and wife are one and that one can-

not conspire. Second: that the husband is presumed to control the wife. Both these propositions have been abandoned in all our legislation in respect to the marital relation. *Schuler v. Henry*, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009; *Wells v. Caywood*, 3 Colo. 487; *Williams v. Williams*, 20 Colo. 56, 37 Pac. 614; *Whyman v. Johnston*, 62 Colo. 461, 163 Pac. 76.

The common law theory that control by the husband is presumed was, in effect, abolished by statute in 1861. R. S. 1908, § 1616. The law of this State requires the coercion by the husband to be proved.

We agree with the theory of *Smith v. State*, 48 Tex. Crim. 233, 89 S. W. 817, rather than with *People v. Miller*, 82 Cal. 107, 22 Pac. 934.

4. The defense contends that their offered instructions, Nos. 2 and 3, should have been given. Both were rightly refused, because they state or imply that the fact of Dalton's taking the machine to Julesburg in pursuance of the conspiracy was necessary to a conviction. The jury were rightly instructed that if they believed beyond a reasonable doubt that there was a conspiracy, they should convict regardless of whether the machine was actually stolen in pursuance of such conspiracy.

The judgment should be affirmed.

Garrigues, C. J. and Scott, J. concur.

No. 9696.

THE PEOPLE v. BEMIS ET AL., EXECUTORS.

INHERITANCE TAX—*Statute Construed.* The inheritance tax imposed by Rev. Stat., sec. 5551 is computed not upon the whole net estate, but upon such estate less the tax imposed by the Act of Congress.

Error to El Paso County Court, Hon. W. P. Kinney, Judge.

En banc.

Hon. VICTOR E. KEYES, Attorney General, Mr. CHARLES ROACH, Deputy Attorney General, Mr. ROY H. BLACKMAN, and Mr. FORREST C. NORTHCUTT, Assistant Attorneys General, for The People.

Mr. NORMAN M. CAMPBELL and Mr. JOHN CAMPBELL, for defendants in error.

Messrs. DINES, DINES & HOLME and Mr. JOHN LYNCH, *Amici Curiae*.

Mr. Justice Denison delivered the opinion of the court.

ALICE COGSWELL BEMIS died, testate, a resident of El Paso County, Colorado, and left a large estate. The tax under U. S. Comp. St. 1916, Ch. 10 A; 39 St. L. 777, was about \$87,000.

The County Court held that the so-called State Inheritance Tax should be computed, not upon the whole net estate, but upon such estate less the sum of \$87,000. The State brings error. We think the judgment is right. It has been held by this court that the inheritance tax law of this State, S. L. 1902, Sec. 21, imposes a tax on the privilege of receiving the legacy or inheritance, and not on the right to transmit by will or by intestate laws. *In re Inheritance Tax Macky Estate*, 46 Colo. 79, 102 Pac. 1075; *Brown v. Elder*, 32 Colo. 527, 539, 77 Pac. 853; *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140. The Federal tax is "imposed upon the transfer of the net estate * * *," 39 St. at L. 777, Sec. 201; U. S. Comp. St., 1916, Sec. 6636½b, therefore it is the power to transfer upon death that is taxed by the National law, and the estate, upon the death, is, to the extent of the tax, instantly depleted. *In re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, 22; *U. S. v. Perkins*, 163 U. S. 625, 630, 41 L. Ed. 287, 16 Sup. Ct. 1073, and, thus diminished, goes to the legatees. 163 U. S. 630. The case last cited construes statutes of New York in one of which the vital words, "imposed upon the transfer", are the same as in the present Federal statute. It therefore has the force of a construction of the latter.

The argument that the transfer, transmission and receipt are one and the same thing is a strong one, but this court is committed to the doctrine that the right to transmit or transfer upon death is one thing and the right to receive a legacy or inheritance is another. Mack case, *supra*. It follows that the State tax must be measured by the estate less the \$87,000.

The judgment should be affirmed.

Garrigues, C. J. and Scott, J. concur.

No. 9749.

POST PRINTING & PUBLISHING COMPANY ET AL. v. CITY AND
COUNTY OF DENVER.

1. **EMINENT DOMAIN—Discontinuance.** A city prosecuting condemnation proceedings may discontinue them at any time before payment of what is awarded as compensation for the lands taken. The city may at once institute a new proceeding.
And the provision in the ordinance authorizing such proceeding that it shall be dismissed if the benefits assessed against the city exceed a specified sum is not an admission that no necessity for the improvement exists.
2. **Uncertainty as to Payment—Constitutional Law.** Proceeding under c. 129 of the acts of 1911 demanding condemnation of private lands for a local improvement.
Sec. 7 of the act provides that a proportion of the condemnation money shall be assessed against properties specially benefited by the improvement, which when collected shall be paid into the city treasury, to be used for the payment of the awards and damages, and that the proper officers of the city shall issue warrants of the municipality to the parties entitled thereto. It was contended by the property owners that all sources from which compensation for the premises taken were limited, so that in effect no provision was made for the payment of compensation.
A like contention was made to another provision of the statute (sec. 19) looking to the payment of the compensation. *Held* the only ground for these contentions being that the special assess-

ment against properties benefited would not be paid, which was mere conjecture, was not a sufficient ground to deny the constitutionality of the statute.

Held further that inasmuch as the judgment of condemnation expressly provided that payment to the property owners should be "in cash or by warrants upon a fund in which money is available for the immediate payment thereof" the property owners were not entitled to question the constitutionality of the law.

3. *Assessment of Benefits—Railway Property*, benefited by special improvements may be assessed the same as other lands.
4. **MUNICIPAL CORPORATIONS—Amending Ordinance.** The amendment of one section of an ordinance under a charter provision similar to that contained in sec. 24 of art. V of the Constitution, does not require that the residue of the ordinance shall be reprinted.
5. **CONSTITUTIONAL LAW—Statute—Unconstitutionality Of**, must appear beyond a reasonable doubt.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. C. C. DORSEY, Mr. THOMAS R. WOODROW, Messrs. BENEDICT & PHELPS, for plaintiffs in error.

Mr. JAMES A. MARSH, Mr. ERNEST MORRIS and Mr. JACOB J. LIEBERMAN, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THIS cause is before us on error to a judgment of the District Court confirming a report of assessments, and an award of damages in a condemnation proceeding under chapter 129, Laws of 1911, to extend the street known as Broadway, in the City of Denver, from Welton Street to Blake Street. The proceeding was based upon an ordinance of said city, known as Ordinance No. 59, of the series of 909, as amended by Ordinance No. 57, of the series of 1916. It is contended that the amendment of Ordinance No. 59 is ineffectual because of an alleged invalidity of the original ordinance; and because, further, the amendment was not adopted according to the requirements of the City

Charter. Section 4 of Ordinance No. 59, in terms limited the amount for which the city could be made liable in the proceeding, and this is said to render the ordinance void. The proviso containing this limitation reads as follows: "Provided, however, that if by the final action of the court in said proceeding, it shall appear that a general benefit has been assessed against the City and County of Denver in a sum exceeding \$115,000.00, then in that event said proceeding shall be dismissed, etc." We cannot agree with counsel that this proviso amounts to an admission that the necessity for the improvement did not exist. The city might find and declare the existence of such necessity, without being willing to pay an unlimited sum toward the improvement. The discontinuance of such a proceeding was within the power of the city at any time prior to the payment or deposit of the sums awarded as compensation for the property proposed to be taken. *D. & R. G. Ry. Co. v. Mills*, 59 Colo. 198, 147 Pac. 681, Ann. Cas. 1916 E. 985; *D. & N. O. R. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582.

In *Garrison v. City of New York*, 21 Wall. 196, 22 L. Ed. 612, the court said: "The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain particular facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. * * *

"Until the property is actually taken, and the compensation is made or provided, the power of state over the matter is not ended." There can be no doubt of the right of the city to dismiss its suit, and begin anew.

Counsel further contend that the amendment of section 4 violates section 216 of the Revised Charter of 1916 which, among other things, requires that in amending or revising an ordinance "so much thereof as is revised, amended, extended or conferred, shall be re-enacted at length." Counsel's view is that this requires the reenactment of the entire ordinance. This provision is the same as that in the constitution relating to the amendment of the statutes. Its purpose has been many times stated by the courts. It is intended to prevent the confusion which results from amending ordinances by reference to the title, or by interpolating words without restating the part amended. Section 4 as amended is complete in itself. To require that the rest of the ordinance be reenacted is to require a vain thing. It is not in accord with reason or authority. The case of *People v. Friederich*, 67 Colo. 69, 185 Pac. 657, is not in point, as the statutes there amended were amended by reference only. The same rule should be applied here as applies to statutes, and that it is not necessary to reenact the whole statute is determined in *Edwards v. D. & R. G. R. R. Co.*, 13 Colo. 59, 21 Pac. 1011. The fact that in that case a new section was added, does not affect the rule announced. The ordinance as amended was a valid enactment and was no less so because the city saw fit to dismiss the original proceeding instituted on it before amendment. The city, having as we have seen, the right to abandon the proceeding, as it did, lost no rights by dismissing the suit. It abandoned the proceeding then pending in court, but not the project. It seems, however, wholly immaterial, whether we regard this as a continuance of the original proceeding, or a new one, there being no doubt that the city might proceed in either way.

As to the objection that since the ordinance provided for but one proceeding, the second proceeding is without force, it should be observed that the first proceeding was never carried out. The basis of this court's judgment in *Fifteenth Street Co. v. Denver*, 59 Colo. 189, 147 Pac. 677, was that the improvement for which the commissioners had made

provision, was not the improvement authorized by the city. This is, therefore, the first proceeding in accordance with the ordinance.

The next and most important question argued is that of the constitutionality of the law of 1911, *supra*. It is said to be unconstitutional because it fails to make provision for certain and reasonably prompt compensation for the property taken; and, further, because it provides for payment otherwise than in money, that is in warrants. The first supposed difficulty is found in section 7 of the act which provides for assessments against property found to be specially benefited by the proposed improvement, the balance of the required amount to be assessed against the city. Counsel contend that both sources from which funds are to be received are limited, and hence the statute fails to provide for adequate compensation. The conclusion that the fund thus to be acquired is inadequate, seems to be reached by assuming that the assessments for special benefits will not be paid. We see no other ground for the conclusion. A conclusion thus reached is too uncertain to furnish a basis for holding an act unconstitutional. The rule is that the unconstitutionality must appear beyond a reasonable doubt. Mere conjecture is not sufficient. As to the amount to be paid by the city, no ground is suggested in support of the objection. Nor is the second ground, which refers to the provisions of Section 19 of the act, a better basis for the attack. Here, again, there is an assumption that if warrants are tendered they will not be promptly paid. But we have now no concern with such a case. The judgment under review requires the city, as a condition of obtaining title and possession, to make payment "in cash or by warrants drawn upon a fund in which moneys are available for the immediate payment thereof." Under this state of the record, plaintiffs in error are not entitled to raise the question of the constitutionality of the law. It is elementary that only those whose rights are affected by the enforcement of the law may question its constitutionality. *Newman v. The People*, 23 Colo. 300, 47 Pac. 278; 12 C. J.

760. Should a case arise in which warrants are offered, when there are no funds available for their payment, a different question would be presented. We have, however, considered the question raised because of its importance, and because counsel contend that we did not definitely determine the question in *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 Pac. 533. The court in that case simply announced that the question had been determined in former adjudications.

Plaintiff in error, The Union Pacific Railroad Company contends, further, that the assessment against it is void because it is laid upon property devoted solely to railroad purposes, and not in terms made liable by the law. The assessment is made upon a tract of railroad property, which is four hundred feet wide where assessed. In the latter part of the contention above stated, the Railroad Company appears to reverse the settled rule, i. e., that taxation is the rule, and exemption the exception, by claiming that the assessment is void because the right to assess railroad property is not expressly given by the law. The language of the act is general, and includes all property usually taxed. The fact that railroad property is not specifically made liable to assessment, while an earlier act, referring to a specific class of public improvements, made such property liable, is not sufficient to create an exemption. That the property will be benefited by the improvement is settled by the decree of the court confirming the findings of the commissioners made on a conflict of evidence. The only question to be determined is the liability of the property to assessment. In *Elliott on Railroads*, Section 786, the author states that there is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments and adds: "The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that, where the right of way receives a benefit from the improvement for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and

unequivocal terms, it is subject to assessment." Gray in his work on Limitations of Taxing Power and Public Indebtedness, section 1913, after discussing the cases which hold a railroad right of way assessable, says: "On the other side are several respectable authorities. If they be closely examined, however, it will be found that the question was one of fact in the particular cases." In *Heman Construction Company v. Wabash Railroad Company*, 206 Mo. 172, 101 S. W. 67, 12 L. R. A. (N. S.) 112, 121 Am. St. 649, 12 Ann. Cas. 630, the court, after examining a large number of cases, says: "In each of these cases the question was one of fact, that is, absence of benefit to the property against which the assessment was made." Upon full review of the authorities, the court held that the right of way was assessable. In Page & Jones on Taxation by Assessment, Section 594, it is said: "It seems well settled that the legislature may provide for the assessment of property owned by a railroad corporation and used for railroad purposes. On the other hand, it seems clear that such property may be exempted from local assessment if the legislature sees fit to exempt it. If the legislature has provided for assessing property benefited, or property within certain territorial limits, and has provided specifically neither for the exemption nor the inclusion of railroad property, we find a number of different views expressed by the courts as to the propriety of assessing railroad property. The discrepancy is greater in *obiter dicta* than in the actual adjudications. In some cases the view is expressed that railroad property is, in the absence of specific exemption, subject to local assessment in the same way as the property of individuals. In other cases, the same general idea is expressed in a more guarded way, and it is said to be proper to assess railroad property if the property is benefited by the particular kind of improvement for which the assessment is levied, while in the absence of such benefit, it should not be assessed. In cases holding this view it has, however, been said that railroad property is *prima facie* to be looked upon as benefited by local improvement. In other jurisdictions a distinction is

drawn between railroad property, which is used for a right of way, or is otherwise permanently devoted to public use, and such property as is not permanently so devoted. The courts drawing this distinction hold that property which is permanently devoted to public use cannot be assessed for local improvement, while property not so devoted can be assessed."

Having this distinction in mind, it appears that upon the question of the right, in any case, to assess railroad property for benefits, but few of the cases commonly cited against the right are strictly in point. Upon the right itself, we are of the opinion that a majority of the cases are in favor of its existence. We are further of the opinion that the reasoning in favor of such right is more persuasive than that to the contrary. The rule of this court, as has been announced, is, on questions of first impression, to follow the rulings of the supreme court of the United States. In *L. & N. Railroad Co. v. Barber Co.*, 197 U. S. 430, 49 L. Ed. 819, 25 Sup. Ct. 466, the court, in holding a railroad right of way assessable, said: "The plea plainly means that the improvement will not benefit the lot because the lot is occupied for railroad purposes and will continue so to be occupied. Compare *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226, 257, 258, 41 L. Ed. 179, 17 Sup. Ct. 581. That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions, which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use. See *Illinois Central R. R. v. Decatur*, 147 U. S. 190, 37 L. Ed. 137, 13 Sup. Ct. 293. On the question of benefits the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the

legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues—for no one can say that changes might not make a station desirable at this point in which case the advantages of a paved street could not be denied.” In the recent case of *Mackey, County Treasurer, v. Choctaw O. & G. R. Co.*, reported in the advanced sheet of the Federal Reporter, Vol. 261, p. 342, the Circuit Court of Appeals said: “The general rule, sustained by the weight of authority, is that a railroad right of way, whether owned in fee or held in easement, is real estate, property, or ground which may be subjected to assessment for the cost of local improvements.”

In this case we have to go no further than to follow the cases above mentioned in the quotation from Page & Jones, which distinguish between the use of railroad property specifically for a right of way, and property not thus used. It appears in this record that the railroad property in question is devoted in a comparatively small part to right of way purposes. It is capable of uses for freight houses, for team trackage and similar purposes, and when so used it would certainly be largely benefited by the opening of a main thoroughfare to its immediate neighborhood.

We conclude then, according to the great weight of authority, that the property in question was assessable and hence the court committed no error in confirming an assessment on it. For the reasons above stated, the judgment is affirmed.

Affirmed.

Decision *en banc*.

Mr. Justice Allen not participating.

No. 9752.

BAKER v. ALLEN.

1. EXECUTION—*Against the Body*, is allowed only where expressly demanded by the pleadings, and where malice, fraud, or wilful deceit is alleged as the ground of such demand.

Mere failure to pay a draft given for the purchase of live stock is not sufficient to establish an intent not to perform a promise of payment given at the time of the purchase.

2. Verdict—*In the Alternative*, finding defendant guilty of "fraud or wilful deceit" is not sufficient to warrant execution against the body.

3. PRACTICE IN ERROR—*Judgment*. A judgment awarding execution against the body, such award not being warranted by the record, the court below was directed to amend in this respect, and thus amended the judgment was affirmed.

Error to Denver District Court, Hon. Samuel W. Johnson, Judge.

Mr. RALPH L. CARR, for plaintiff in error.

Mr. J. W. KELLEY, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error brought suit against the plaintiff in error for damages, alleging in one cause of action that the defendant had, through an agent, pretended to purchase of plaintiff one hundred and five head of cows for \$3,412.51, the purchase being made upon the promise that a sight draft on the defendant for the purchase price would be honored; that the cows were shipped to defendant, draft drawn, but not paid, and the cows thereafter sold in Denver, and the proceeds converted by the defendant to his own use.

The second cause of action charges that the defendant, at the stockyards in Denver, converted said cows to his own use to the damage of plaintiff in the sum of \$3,412.51.

For a third cause of action, plaintiff alleges: "That all of the acts against the said property of the plaintiff were

done with and accompanied by fraud, malice, deceit and a wanton and reckless disregard of plaintiff's rights and feelings: wherefore plaintiff is entitled to exemplary damages in the sum of Three Thousand Dollars (\$3,000.00), in addition to the actual damages herein set forth."

The prayer of the complaint is for \$3,412.51 actual damages; for \$3,000.00 exemplary damages; for costs; and general relief.

The case was tried by the plaintiff on the first cause of action, the testimony tending to show a purchase, through an agent of defendant, and defendant's promise, through said agent, to pay a draft on him for the purchase price. Defendant denied that he authorized the purchase, or promised to pay the draft; but admitted that the cattle had been sold for his account. He confessed judgment for the purchase price, less \$200.00, paid by him to plaintiff. The sale was made by a commission company, and the proceeds, less said \$200.00, applied in cancellation of a debt owing to it by the defendant. After the jury had been instructed, defendant's attorney found that the verdict prepared by the clerk contained the following: "We further find the defendant guilty of malice, fraud or wilful deceit in committing the tort complained of." He objected to the submission of that question to the jury, but the objection was overruled. The jury returned a verdict in favor of the plaintiff for \$3,212.51 damages; \$500.00 exemplary damages, and the following: "We further find the defendant guilty of fraud or wilful deceit in committing the tort complained of." The court instructed the jury that in case they found that the acts complained of were accompanied by malice, fraud or insult, or with a wanton and reckless disregard of plaintiff's rights and feelings, they might assess exemplary damages. There was no instruction, however, as to a finding to serve as a basis for an execution against the body of defendant. Nor should there have been one. Plaintiff tendered no issue of that kind. He alleged, in the language of the statute, that the acts of which he complained, were accompanied with fraud, etc., as a reason

for demanding exemplary damages. The plaintiff in error, now insists, as he did in his motion for a new trial, that so much of the judgment as awards an execution against the body of the defendant, should be stricken out. We are of the opinion that he is right. Neither the complaint nor the evidence justified a finding upon which a body judgment could be entered. The nearest approach to an allegation of fraud is that "defendant wrongfully pretended to buy" the cattle, by "having an agent promise and agree to pay," etc. and "promised and agreed to honor a sight draft," etc. and "wrongfully refused to pay or honor the draft." The evidence for the plaintiff disclosed no fraudulent intent on the part of defendant, if the purchase was, in fact, made by his agent. The sale was made, not upon a false statement as to a fact, but upon a *promise* to pay. This is not a misrepresentation in law. Defendant, if he so promised, was guilty only of a breach of contract when he failed to pay. There is nothing in the evidence to show an intent, when the promise was made, not to perform it. In the absence of proof of such an intent, it must be held that the title passed, and there was no conversion, and hence no tort.

In *People v. Healy*, 128 Ill. 9, 20 N. E. 692, 15 Am. St. 90, where the right to a body judgment was claimed, the court said: "The ground of liability, in this class of cases, that renders the defendant amenable to an action in tort, rests upon the affirmation of some existing fact which the party making it knows, or has good reason to know, to be false. * * * 'A promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise.'"

Under the pleadings and the evidence, the form of the verdict submitted was wrong.

The verdict itself, on this point, is bad, as the finding is in the disjunctive. It is impossible to say whether defendant was found guilty of fraud, or wilful deceit, or whether some of the jurors found him guilty of one and others of the other offense. *Jewell v. Railway Co.*, 54 Wis. 610, 12 N. W. 83, 41 Am. Rep. 63.

The cause is, therefore, remanded to the District Court with directions to amend the judgment by striking out so much thereof as provides for an execution against the body of the defendant, and as so amended it will stand affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9427.

TWOMBLY v. SAUVE.

1. FRAUDULENT CONVEYANCES—*Consideration.* The wife holding in her own name, merely for the convenience of the husband certain of his properties, exchanged the same for lands which were conveyed to the husband. The husband subsequently reconveyed these lands to the wife. The conveyance was held fraudulent as against the creditors of the husband.

PRACTICE IN ERROR—*Presumptions.* A finding of fact not questioned in the assignments of error, nor in the brief, may be presumed to be supported by the evidence.

Error to Denver District Court, Hon. H. P. Burke, Judge.

Mr. CHARLES H. REDMOND, Mr. J. H. BURKHARDT and Mr. THOMAS F. MCGOVERN, for plaintiffs in error.

Mr. CHAS. R. BOSWORTH and Mr. S. S. ABBOTT, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is a suit to set aside, and to declare fraudulent and void, a certain warranty deed which was executed on November 1, 1915 by George W. Twombly to Margaret M. Twombly, his wife, conveying a tract of land situated in Weld County. This suit was instituted on June 15, 1916, by the trustee in bankruptcy of the above named George W. Twombly, who had theretofore, and on December 20, 1915, been adjudged a bankrupt by the United States District Court. The deed is sought to be set aside in order that the real estate, covered by such deed, may be treated as the

property of the bankrupt and held by the plaintiff, as trustee in bankruptcy. George W. Twombly and Margaret M. Twombly, the grantor and grantee, respectively, in the deed, are the parties defendant. The usual pleadings were filed on both sides, and issues joined. Upon trial before the court, without a jury, findings were made, and a decree rendered, in favor of the plaintiff. The defendants have sued out a writ of error.

The plaintiffs in error, defendants below, claim that the following facts are "disclosed by the evidence": That in the year 1911, Margaret M. Twombly was the owner of two lots in the Town of Fort Lupton, Colorado; that at that time one Joseph King was indebted to her in the sum of approximately \$300.00; and that an agreement was made between her and King, whereby she should convey her town lots to King, and cancel his indebtedness to her, in consideration of which King agreed to convey to her a certain tract of eighty acres. The plaintiffs in error further state, in effect, that Margaret M. Twombly performed the agreement on her part, and that King in performing his part of the agreement executed the deed to George W. Twombly, the husband, instead of to Margaret M. Twombly, the wife, from whom, it is alleged, the consideration came. The legal title, transferred by the deed above mentioned, was held by George W. Twombly until November 1, 1915, when he conveyed the same, by warranty deed, to his wife. It is this latter conveyance which is involved in this suit.

The only assignment of error which appears to be argued by the plaintiffs in error is that numbered IX, that "the findings and decree of the court are contrary to law." In this connection, the facts above mentioned are recited, whereupon the plaintiffs in error invoke the rule, that where the consideration is paid by the wife and the conveyance made to the husband, the husband will be deemed to be a trustee of the property thus acquired, for her benefit. It is not disputed that if this rule is applicable under the facts in the instant case, the conveyance from Twombly to his wife was not fraudulent, but was merely placing the

legal title in one who was already the equitable owner and entitled to the legal title.

Under the findings of the court, however, the rule above mentioned, and relied on by plaintiffs in error, has no application. The court did not find that the consideration for the deed from King to George W. Twombly was paid by the wife, Margaret M. Twombly. The trial court found, in effect, that while, in a sense, the wife furnished the consideration for the conveyance made to her husband, nevertheless such consideration consisted of money and property which she had previously received from her husband, not as a gift, but to hold for convenience. In other words, that the consideration for the deed from King really came from the husband, George W. Twombly, who was named as grantee in the deed, and did not come from, nor was such consideration owned by the wife, Margaret M. Twombly. There is sufficient evidence in the record to sustain that finding. Moreover, neither any assignment of error nor the brief of the plaintiffs in error makes any specific objection to such finding, and we might, for this reason alone, presume that the finding was warranted by the evidence. 4 C. J. 777, sec. 2727. No attempt is made by the plaintiffs in error to show why the decree should be held to be erroneous if the facts, above mentioned, regarding the source of the consideration for the King deed, are to be taken as established, as they must be, in accordance with the trial court's finding. Under these circumstances the decree should be upheld. *Downing v. Tipton*, 48 Colo. 364, 110 Pac. 70.

The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Scott concur.

No. 9351

REITLER v. OLSON.

1. PRIOR ACTION PENDING—*To Which Plaintiff is No Party*, is no plea.
2. JUDGMENT—*Who Affected By*, only parties to the action.
3. SPECIAL CONTRACT—*Quantum Meruit*. One who alleges a special contract and gives evidence thereof is not entitled to recover on a *quantum meruit*.
4. PRACTICE IN ERROR—*Failure to Decide Only Question of Facts* properly presented, is error.

*Error to Denver District Court, Hon. John I. Mullens,
Judge.*

Mr. EDMUND J. CHURCHILL, for plaintiff in error.

Messrs. HILLIARD & FINNICUM and Mr. W. B. MORGAN,
for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

THE case of William Harvey against Arvid Olson was pending in the District Court of the City and County of Denver. A referee was appointed therein to take testimony, and he in turn appointed plaintiff in error "as shorthand reporter to take and transcribe the evidence from day to day." After the completion of the work plaintiff in error brought this action against said Arvid Olson, defendant in error, for one-half his compensation as such reporter for the referee, less certain credits thereon for amounts already paid by Olson. The complaint alleges a special contract between the plaintiff and said Harvey and Olson, by which each agreed to pay one-half of said compensation; that plaintiff has fully performed the contract on his part, and made due demand upon defendant for payment of his proportion of the compensation; but that, except for the credits mentioned, defendant has neglected and refused to make payment.

Defendant admits the appointment of plaintiff, the performance of the services, and his failure to pay. He pleads "another action pending" by reason of an order of court, entered against him on motion of the referee, for the payment of one-half of the reporter's compensation. He pleads *res adjudicata* based upon the same fact, and denies the special contract. Plaintiff, in his replication, meets the defense of "another action pending", and *res adjudicata* by the allegation that he was not a party to the original suit wherein the order was made on motion of the referee. The cause was tried to the court without a jury. The entry of the order on the motion of the referee is uncontradicted. As to the existence of the special contract alleged in the complaint the evidence is conflicting, and is ample to support a finding that there was, or was not, such a contract. The trial occurred November 13, 1917, and at its close the matter was taken under advisement until December 10, 1917, when the court made the following oral findings: "The items sued for by the plaintiff grow out of a reference case of *Harvey vs. Olson*, and his amount is made up of sixty-nine and a half day's service at ten dollars per day; 13,822 folios of original transcript at twenty cents a folio, or \$2,764.40; indexing, binding and mounting testimony and exhibits, \$200.00, and also, then, there is another question of five cents per folio for copies of the original transcript. I feel in this case that per diems and folios furnished to the original referee are really matters of court costs, and can be adjudicated in the case of the referee, so that finding will be for the defendant. All this matter can be adjusted, I think. The defendant has probably overpaid, in his theory of the case, but the whole matter can be adjusted in the original suit, and for that reason the judgment will be for the defendant." Based thereon the clerk entered a formal finding as follows: "This cause having been heretofore submitted to the Court and by the Court taken under advisement upon the merits of the cause, and the Court being now sufficiently advised in the premises, and the Court having heard the evidence produced as

well on behalf of the said defendant as of the said plaintiff, and the argument of counsel and being now sufficiently advised in the premises, doth find the issues herein joined for the defendant herein."

December 12, 1917, motion for new trial was filed, which was overruled December 14, 1917, and the following order and judgment entered: "It is ordered by the Court that judgment be entered herein in favor of the defendant for his costs in accordance with the finding of the Court and let the same be recorded in the Judgment Book.

The Court having this day ordered that judgment be entered herein in accordance with the finding of the Court; now therefore,

It is considered by the Court that the said plaintiff take nothing by his said suit; and that said defendant go hence hereof, and have and recover of and from the said plaintiff his costs in this behalf laid out and expended, to be taxed, and have execution therefor." The case is now before us for review on error.

Burke, J., after stating the case as above.

The defenses of "another action pending" and *res adjudicata* are clearly unavailing. Plaintiff was not a party to the original action; his claim of a special contract covering his services was not adjudicated therein; he was not heard upon the entry of the order in question, and is not bound thereby.

Aside from the foregoing the sole question for consideration of the trial court was, "Did the plaintiff have an express contract as alleged in his complaint?" If not judgment should have been for the defendant. If so judgment should have been for the plaintiff for the amount due him thereunder. Having set up such a contract, and offered evidence thereof, plaintiff could obtain no relief on a *quantum meruit*. *Burlington Co. v. Chapman*, 53 Colo. 28-29, 123 Pac. 649; *Jensen v. Nall*, 53 Colo. 212-213, 124 Pac. 471. The court could give no judgment without first determining the fact of the existence, or non-existence, of the contract pleaded. Had the court made no specific find-

ings, but entered a general judgment, the presumption always indulged in such cases would unquestionably attach, and the judgment be upheld on the theory that the court had found the existence of the facts essential to its validity. Had the court given a wrong reason for its findings and judgment, and the record disclosed other reasons making the entry of such judgment obligatory, it would not be disturbed. But the record and bill of exceptions before us clearly establish, not only that the court gave the wrong reason for the judgment entered, but that it declined to pass upon a disputed question of fact which was the only question properly before it for adjudication. "The defendant (or plaintiff) has an absolute right to have the dispute determined upon the issue tendered. This was not done, but judgment was entered on a theory neither presented by the pleadings nor supported by the evidence." *Burlington Co. v. Chapman, supra*. Judgment was entered for the defendant "for the reason" that "The whole matter can be adjusted in the original suit" showing a failure and refusal on the part of the court to pass upon the question of the existence of the special contract sued upon, which was the sole matter in litigation. Plaintiff is entitled to judgment for or against him on his cause of action. That right has thus far been denied him. This court is without power to determine questions of fact on conflicting evidence, and it is error for the trial court to refuse to pass on an issue made by the pleadings and essential to a determination of the litigation. *Cincinnati v. Kemper, et al.*, 9 Ohio Dec. (Reprints), 742.

The judgment is accordingly reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Garrigues, C. J. and Scott, J., concur.

Decided Dec. 1, A. D. 1919. Rehearing denied Feb. 2, A. D. 1920.

No. 9757.

INDUSTRIAL COMMISSION, ET AL. v. SHADOWEN.

1. INDUSTRIAL COMMISSION—*Findings of Fact*, by the commission as to the number of employees, of an employer may not, ordinarily, be disturbed by the court. It is error to set aside such finding when supported by the testimony of the employer himself.
- 2 *Who Within the Statute—Farm Laborers*. One who goes from farm to farm operating a thresher is not a farm laborer within the exception contained in clause III of sec. 4 of the Session Laws of 1915, c. 180.

Error to Morgan District Court, Hon. L. C. Stephenson, Judge.

Hon. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Assistant and Mr. H. E. CURRAN, for plaintiffs in error.

Mr. WALTER S. COEN, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS is a proceeding on error to the District Court of Morgan County in review of the findings and order of the Industrial Commission. M. E. Wolfe was an employee of the defendant in error, Shadowen, who was engaged in the business of operating a threshing machine. He proceeded from place to place, threshing the grain of farmers for hire. Wolfe was employed to operate the steam engine which supplied the power, and while so engaged, was severely injured. The Industrial Commission, upon a hearing, entered an order granting compensation. An appeal was taken to the District Court, where the order of the Commission was set aside, and where it was held that the claimant was not entitled to an award. This decision is before us for review.

The Commission found that both the employer and his employee were within the provisions of the Workmen's Compensation law and subject thereto. The court found specifically:

"(a) That the plaintiff, Shadowen, was not an employer of more than three men regularly employed in his occupation of threshing grain.

(b) That the men employed to pitch grain were casual employees.

(c) That whatever employees were employed by the plaintiff were engaged in an agricultural pursuit and were exempt from the operation of the Workmen's Compensation Law.

(d) That the plaintiff had not elected to come under the Workmen's Compensation Law, and was not bound thereby."

The question as to the number of employees in the employ of an employer is a question of fact to be determined by the commission, and under the statute, such finding may not ordinarily be disturbed by the court.

Shadowen himself testified that it required at least four men to operate the machine, though at times he had only three who went with the outfit and that he sometimes employed and paid additional men furnished by the farmers. His testimony upon this point is as follows:

"Q. So the men pitching bundles made you have four employees?

A. I had four men, yes, and at times five, enough to run the outfit.

Q. How many men did you have at most at any one time in October?

A. Eight.

Q. During the season of 1918 was it your practice to furnish these men, or did you aim to run the outfit and let the farmers furnish all the labor outside of the three men?

A. We calculated to run with the crew; sometimes we could not, and put on a pitcher.

Q. Do you go into the season's work prepared to operate either way?

A. Yes, sir."

He further testified that he paid all employees, whether secured by the farmer or not.

Upon the testimony of the employer himself, the commission was justified in finding that he was an employer of at least four men in his enterprise, and it was error for the court to disturb such finding.

It was held by the trial court that the employee was engaged in an agricultural pursuit and therefore the employment was not within the statute. The exemption provided by the statute is as follows: "Provided, that any employer commencing business subsequent to August 1, 1915, may make his election not to become subject to the provisions of this act at any time prior to becoming an employer of four or more employees, in a common employment, exclusive of private domestic servants and farm and ranch laborers, by giving notice as above provided. Such employer may withdraw from the provisions of said sections of this act at the expiration of one year, in the manner provided by this act." It will be seen that the language of our statute does not state the exemption to relate to those "engaged in agricultural pursuits", as is the case of some other statutes, but does exclude from the operation of the law only "private domestic servants, and farm and ranch laborers." The theory of the law is that domestic service and farm and ranch labor are not to be classed as hazardous occupations, and for such reason are exempted from its operation.

The precise question was determined in *In re Boyer*, 117 N. E. (Ind.) 507, under a statute similar to our own in that farm laborers were exempted from the operation of the statute. The court there said: "In construing or interpreting an act of the Legislature the courts may take into consideration the general scope and purpose of the act and the condition that prevailed at the time of its passage. *Board, etc., v. Given*, 169 Ind. 468, 80 N. E. 965, 82 N. E. 918; *Hughes v. Indiana Union Traction Co.*, 57 Ind. App. 202, 105 N. E. 537, and cases cited. The purpose of the act, as indicated by its title, was to prevent industrial accidents, and to provide compensation and adequate medical and surgical care for those injured by accident while

engaged in industrial pursuits. It is manifest that the purpose of the act was to include within its benefits employes in all industrial pursuits, except those expressly mentioned in the exemption proviso, *supra*.

While the threshing of wheat may be a part of the work necessary to be done on the farm, the farmer himself rarely does it. On the contrary, he has it done by someone who is specially equipped with the machinery necessary to do this kind of work. Wheat threshing is a business or industrial pursuit in and of itself, entirely separate and independent of farming. We apprehend that it would not be contended that the employee of the miller employed in grinding the farmer's wheat into flour, while so engaged, is doing farm or agricultural work. Yet, as affecting the question of what relation the labor of their employes sustains to that of the farm, or agriculture in general, we can see little if any difference between the thresher and the miller. They each have to do with getting the farm product ready for consumption. It is true the miller's work is a step further removed from the farm, but each is engaged in a business separate from and independent of the farm, which requires machinery, equipment and labor peculiar to the business, and not ordinarily required on or incident to farm work. The only difference between the occupations which suggests itself to our minds as one that might be urged as affecting the question whether each of the occupations are separate and independent of that of the farm, and whether the labor of their employees, while engaged to assist in the operation of such respective businesses, is farm labor, is the fact that the thresher goes to the farm to thresh the farmer's wheat, while the farmer takes his wheat to the miller to get it ground into flour." The same reasoning is adhered to in *White v. Loades*, 178 N. Y. App. Div. 236, and reaffirmed in *Vincent v. Taylor*, 180 N. Y. App. Div. 818.

The Supreme Court of Oregon has given a still broader construction to the act. *Raney v. Industrial Commission*, 85 Ore. 199. The employer was a farmer and the opera-

tion of an ensilage cutter was but an incidental employment. It was there said: "The fact that the operation of an ensilage cutter may have been merely incidental to farming, the business in which plaintiff's employer, D. R. Tinnerstet, was generally engaged, did not make the management of the "feed mill" a less hazardous occupation. 5 Sutherland Dam. (5 Ed.), § 1376, p. 5185; *Wendt v. Industrial Ins. Com. of Washington*, 80 Wash. 111 (141 Pac. 311, 5 N. C. C. A. 790); *State v. Business Property Security Co.*, 87 Wash. 613 (152 Pac. 334)."

The contrary view is seemingly adopted by the Supreme Court of Iowa. *Slycord v. Horn*, 162 N. W. 249. Though the decision seems to have been largely based upon the language of the Iowa statute, in the matter of exemption from its operation, "engaged in agricultural pursuits", and the fact that the employee was employed as a farm laborer generally. That case was followed in the case of *State ex rel. Bykle v. District Court*, 168 N. W. (Minn.) 130.

We are of the opinion that the New York and Indiana cases are supported by the sounder reasoning and are more in harmony with the spirit and purpose of the Workmen's Compensation law. These cases are likewise supported by the greater weight of authority.

In this case the employee was not employed to labor on his employer's farm, but to operate the engine of a threshing machine engaged in traveling about the country threshing grain for those who desired such service; in other words, his employment was not merely incidental to general farm labor, and in our opinion the employer and the employee in such case are clearly within the operation of the statute.

The judgment is reversed with instructions to the District Court to enter an order affirming the finding and award of the Industrial Commission.

Judgment Reversed.

Garrigues, C. J., and Denison, J., concur.

No. 9759.

ANALYTIS v. THE PEOPLE.

CRIMINAL LAW—*Robbery*. One who, attempting to reclaim money stolen from him, assaults the supposed thief, taking the money stolen is not guilty of robbery.

Error to Denver District Court, Hon. Greeley W. Whitford, Judge.

Department One.

Mr. JOHN T. MALEY and Mr. PAUL DELANEY, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. W. L. HOGG, Assistant, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

DENNY ANALYTIS, plaintiff in error, was tried on a charge of robbery, found guilty and sentenced to the State penitentiary. To review that judgment he brings error and the cause is now before us on his application for a supersedeas.

The only alleged error requiring our consideration is that the verdict is unsupported by the evidence, in that there was no proof of the *animo furandi*. The information charges that defendant violently assaulted one James Caramuigis and by force and intimidation robbed him of \$50.00 in money.

[There is no material conflict in the evidence. Defendant claimed one hundred dollars had been stolen from him; that he had reason to believe, and did believe, the prosecuting witness, Caramuigis, guilty of the theft; and that, acting upon that belief, he retook by force from said Caramuigis the money in question. Caramuigis himself admits that the assault was made on him by defendant under said claim and was accompanied by said charge. The record contains nothing from which any other conclusion could be reached. If such were the circumstances of the assault no robbery

was committed.] See *State v. Hollyway*, 41 Iowa 200, 20 Am. Rep. 586, and authorities therein cited. For this failure of proof the judgment is reversed.

Garrigues, C. J. and Teller, J. concur.

No. 9734.

BUSH v. THE PEOPLE.

1. *CRIMINAL LAW—Fair Trial.* Defendant while without counsel, was arraigned under an information charging (1) Larceny of an auto car, and (2) Receiving the car knowing it to have been stolen, and requested further time to plead. This was denied. Shortly before this and while represented by counsel he had pleaded not guilty to an information containing the same charge upon which he was arraigned. *Held* not prejudicial.
2. *Excessive Bail.* One without means to employ counsel is not to be excused from giving bail, when charged with a crime, even though he is already under his personal recognizance, in a former information, charging the same offense.
3. *Continuance.* A continuance on the day appointed for trial, granted against the prisoner's objection, was assigned for error, because on the day first appointed he had a witness present, whose attendance he was not able to procure at the later day. No effort of prisoner to secure the attendance of his witness being shown, his contention as to the illegality of the continuance was held without merit.
4. *Endorsement of Additional Witnesses Upon Information, after its filing,* will not be regarded as error where no objection is taken either before trial or when the witnesses are sworn, and no surprise or prejudice to the accused is shown.
5. *Promise of Indemnity to Witness,* goes only to his credibility.
6. *Instructions.* Information for larceny, and for receiving the same goods, knowing the larceny. Verdict of guilty upon both counts. The judge instructed the jury that the accused could not be convicted of both these offenses, and directed them to revise their verdict. *Held* these remarks were not instructions within the meaning of Rev. Stat., secs. 1987-1988.

7. *Discourse by Judge*, in imposing sentence. His Honor in announcing the sentence of the convict alluded to the prevalence of the crime with which he was charged, and his former conviction. *Held* not error.
8. *Accomplice—Corroboration Of*, may be by circumstances.
9. *Record*. Complaints of prejudicial circumstances not evidenced by anything in the record will not be considered.
10. *Other Crimes*, of similar character participated in by the accused is competent, and comment of counsel thereon is proper.

Error to Denver District Court, Hon. Greeley W. Whitford, Judge.

Department One.

Mr. H. G. SAUNDERS, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. CHARLES H. SHERRICK, Assistant, for The People.

Mr. Justice Burke delivered the opinion of the court.

PLAINTIFF in error (hereinafter referred to as defendant) was tried in the court below on an information the first count of which charged the theft of an automobile, the second, receiving the same car knowing it to have been stolen. He was found guilty of the larceny and sentenced to the penitentiary for a term of not less than nine nor more than ten years. To review this judgment he brings error and the cause is now before us on his application for supersedeas.

It is the contention of defendant that the trial court committed many prejudicial errors; more particularly the following: 1. That defendant was obliged to plead without advice of counsel; 2. That excessive bail was required; 3. That a continuance was denied him and later granted the people over his objection; 4. That witnesses were improperly endorsed upon the information after it was filed; 5. That the evidence of a witness, procured by a promise of immunity, was admitted against him; 6. That the court orally instructed the jury; 7. That the court in imposing

sentence took into consideration matters not of record in the case; 8. That defendant was convicted upon the uncorroborated testimony of an accomplice; 9. That defendant's conviction was brought about largely by public clamor and adverse newspaper comment, and that the general conduct of the court showed bias and prejudice; 10. That evidence of offenses other than the one charged in the information was improperly admitted and counsel for the people permitted to comment thereon in argument. We will consider the foregoing in the order stated.

1. Defendant when arraigned was not represented by counsel and his request for further time before plea was denied. Thereupon he entered a plea of not guilty. Shortly preceding that date, and while represented by counsel, he had entered the same plea to an information containing a single count and making the same charge as that contained in the first count of the information on which he was convicted, hence for this and other reasons no prejudice arose.

2. Defendant's bail was fixed in the sum of \$3,000 with good and sufficient sureties. It is said that this was excessive and one of the reasons urged is that he already was under a similar bond in another case charging larceny of the same property. In the first case defendant's own recognizance was taken. It would appear that such recognizance was worthless because defendant was financially unable to employ counsel. Considering this, and the further facts disclosed by the evidence, the order complained of was more than justified.

3. The cause was first set for trial over the protest of defendant. On the date fixed he appeared by counsel (who meanwhile had been appointed by the court), announced himself as ready and insisted upon proceeding, thus waiving any possible error in the setting. A five day continuance was then granted on motion of the District Attorney, and over defendant's protest. The only possible reason suggested why such a continuance was prejudicial is that defendant had a witness present on the first date whom he could not procure on the second; but as defendant intro-

duced no evidence in his own behalf, and the record is silent as to the issuance of any subpoena, or any other attempt by defendant to procure the attendance of such witness, the contention is without merit.

4. After the filing of the information the names of seven additional witnesses were endorsed thereon, the last one being so endorsed two days before the trial. No objection on this ground was presented at the beginning of the trial, nor called to the attention of the court when the witnesses were sworn. No showing of surprise or prejudice was made on behalf of defendant, and no application for a continuance. Under these facts it is well settled that error can not be predicated upon such an endorsement. *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; *Askew v. People*, 23 Colo. 446, 48 Pac. 524; *Wickham v. People*, 41 Colo. 345, 93 Pac. 478.

5. It is contended that the evidence of one of the principal witnesses was procured by a promise of immunity and should therefore have been excluded, but the holding in *Barr v. People*, 30 Colo. 522-528, 71 Pac. 392, cited in support of this position, is to the contrary. Such promise goes only to the credibility of the witness, not to his competency. "It does not appear that the offer was made by any person in authority, or who claimed to be in authority, or whom the witness presumed, or had any reason to presume, had any authority." *Castner, et al. v. People*, 67 Colo. 327, 184 Pac. 387.

6. The jury, after deliberation, returned into court and presented verdicts of guilty on both counts of the information. These the court declined to receive, explaining that the defendant could not be found guilty of stealing the automobile in question and at the same time be found guilty of receiving the machine knowing it to have been stolen, and directed the jury to return and complete its labors accordingly. These remarks of the court were not "instructions" in the sense in which that term is used in the statute and hence not a violation of Sections 1987 and 1988, Rev. Stat. 1908. *People v. Bonney*, 19 Cal. 427-446. Furthermore,

as the jury had presented verdicts finding defendant guilty of two separate and distinct offenses and as a result of these remarks of the court a verdict of guilty was finally returned only as to one, the error, if any, was in defendant's favor and he can not be heard to complain. *Irving v. People*, 43 Colo. 260-262, 95 Pac. 940.

7. It is contended that statements made by the court at the time of sentence show that in fixing the punishment matters outside the record, i. e., the general prevalence of such offenses and the former conviction of defendant, were taken into consideration. Where, as here, evidence of the particular offense has been fully heard, and the term of sentence is within the discretion of the court, it is not improper to notice also matters of common knowledge in the community or facts disclosed by the court's own records; just as it is permissible to take into consideration statements made by the defendant in answer to the question why judgment should not be pronounced against him. *Tracey v. State*, 46 Neb. 361-367, 64 N. W. 1069.

8. It is said that defendant was convicted upon the uncorroborated testimony of an accomplice. This is incorrect even as to direct testimony, but corroboration may be by proof of circumstances as well and it is sufficient to say that here there is no lack of such corroboration.

9. It is urged that the prejudice of the trial court, public clamor, and adverse newspaper comment, contributed to the verdict. On these subjects the record is silent.

10. It was the contention of the people that the machine in question was taken by the witness Dale under an arrangement theretofore entered into between himself and defendant while both were incarcerated in the county jail, this arrangement being that Dale was to steal automobiles and deliver them to defendant at a certain fixed price per car; that such cars were then "worked" (numbers and identification marks changed or obliterated) and sold by defendant; that the car mentioned in the information was one of those stolen and disposed of as a part of this general plan; that defendant had a similar arrangement, as a

part of his scheme for reaping profit from stolen automobiles, with the witness Bretz. There is ample evidence in the record to sustain this contention and prove the particulars of this scheme. Under such circumstances evidence of the other thefts was clearly admissible under the second count of the information, and comment of counsel thereon proper. *Housh v. People*, 24 Colo. 262, 50 Pac. 1036; *Elliott v. People*, 56 Colo. 236, 138 Pac. 39; *Myers v. People*, 65 Colo. 450, 177 Pac. 145; *Castner v. People*, 67 Colo. 327, 184 Pac. 387.

Other minor matters are mentioned in the briefs which it is unnecessary to consider. We are satisfied that defendant had a fair trial and that no prejudicial error was committed against him. The supersedeas is accordingly denied and the judgment affirmed.

Garrigues, C. J. and Denison, J. concur.

No. 9765.

ROSENBERG v. TENNANT.

1. NEGLIGENCE—*Right of Property Owner to Prevent Invasion Thereof.* The owner of a city lot may erect a fence to obstruct travel across the corner thereof.

The character of the obstruction does not concern the public save so far as it will or will not afford notice of its presence to those attempting to use the cut-off. In an action by one injured by collision with the fence, in the night-time, the amount of travel over the cut-off, and the length of time it had been used are to be considered in determining the question of negligence.

2. INSTRUCTIONS—*Misleading.* In an action for negligence, tried in the County Court on appeal from a justice of the peace, the jury were referred to the declaration for the detail of the negligence charged. There being no pleadings in such case, *Held* that the jury were left without light as to what was alleged against defendant.

3. *Assuming What is in Dispute*, is error.

4. *Too General.* Defendant erected a fence to exclude travel across the corner of his lot. Plaintiff driving against it in the evening was injured, and brought an action for the injury. The jury were told that it would be negligence to place in the former used road a barbed wire fence that might occasion damage to a traveller "by the ordinary casualties" of travel. Held too broad in the passage quoted. That the only damage for which defendant would be liable was that which might result from negligence in not giving notice of the presence of the fence; that the instruction took from the jury the question of the sufficiency of the notice of the change in the passage.

Error to Fremont County Court, Hon. Kent L. Eldred, Judge.

Application for Supersedeas.

Mr. GEORGE H. WILKES and Messrs. JEFFREY & STINEMEYER, for plaintiff in error.

Messrs. McLAIN & PEASE and Mr. I. W. IBBOTSON, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error sued plaintiff in error in a justice court to recover damages for personal injuries, and had judgment. On appeal to the County Court, a like result followed and the cause is now here on error.

Plaintiff was injured while riding in an automobile which collided with a barbed wire fence across a corner of defendant's property. This fence, some twenty-one feet long, and consisting of but two wires, had been built by the defendant, on the day of the accident, to prevent people from using a portion of a vacant lot as a "cut off" from the street in front of the lot to the street at the side thereof. Plaintiff's witnesses testified that the cut off, or driveway, had been used for years, but afterwards corrected their statements in view of evidence that less than two years before the accident a fence on the lots had been removed, thus for the first time making such cut off possible. It appears that this driveway had been used more or less, with some interruptions for a period of a year and a half.

Defendant testified that he protested to the owners of teams, which began the use of this way, and that when the protests were unavailing, he built a small garage across this beaten track. Then, it appears, parties made a track around the garage. Defendant testified also that some time before the accident, he placed a notice on said track that it was not to be used, also that when he built the fence he attached such a notice to a post at the corner of the lot where it could be seen by persons using the way, also that there was a board supporting the wires where they crossed said way, and another board, between the wires projecting from the garage. This post was one of the end supports of the wires, the garage furnishing the other support. The accident occurred just after dark.

If the defendant was guilty of actionable negligence, it must have been due to his failure to give such notice of the obstruction across the way as was reasonable under such circumstances. That he had the right to fence his lot cannot be doubted, it not being claimed that the track used was a public road. The kind of fence he put up did not concern the public, except so far as the fence itself would or would not notify persons using the driveway in time to avoid collision therewith. Of course the amount of travel over this cut off, and the length of time it had been used, were matters to be considered in determining the question of negligence.

It is urged that the Court erred in the giving of Instructions 1 and 2. The part of Instruction No. 1 to which objection is made, reads as follows: "Gentlemen of the jury, if you believe, from the evidence, that the plaintiff has sustained injuries on account of the negligence of the defendant as set forth and claimed in his declaration, then the measure of his recovery is such damages as will compensate him for such injuries. The elements which may enter into such damages are the following."

The objection to it is that it directs the jury to plaintiff's declaration for a statement of the negligence charged, when in fact, the case having begun in a justice court,

there were no pleadings. This left the jury without light as to the acts of negligence charged, and free to determine what such act was or might be, for which defendant would be liable.

Instruction 2 is as follows: "In order to entitle the plaintiff to recover, the plaintiff must establish that the defendant was negligent in the acts complained of and that the accident complained of and the accident sustained, by reason thereof, were not contributed to in any way or manner by any neglect or careless act of the plaintiff. It would be neglect for the defendant to place in the former used road, a barbed wire fence which might occasion damage to travelers by reason of the ordinary casualties that travelers are liable to encounter while traveling said roadway, unless said defendant had given the public due notice that said road had been closed. And it would devolve upon the plaintiff, while traveling upon said roadway to use ordinary care in driving his automobile and avoid accident that might happen."

The objection made to this is that it assumes the existence of a road, which was a matter in dispute. Clearly if the use of said way was such as to constitute it a road, a different degree of care would be required in closing it from what would be sufficient, if infrequently used and for a short period.

This instruction contains the only approach to a definition of the negligence, which would entitle the plaintiff to recover, which the court gave the jury. Its declaration as to defendant's liability is too general and broad. If he had erected a fence from which travelers might reasonably be expected to receive injury, if not notified of its presence, he would be liable for such injury, but he would not be liable because it "might occasion damage to travelers by reason of the ordinary casualties that travelers are liable to encounter while traveling said roadway," even if he had not given notice of the fencing of the track. A bolting horse, or an automobile with a defective steering gear might collide with the fence and damage result there-

from, regardless of notice of the obstruction. The only damage occasioned by the presence of the fence across the beaten track, for which defendant would be liable is that which resulted from negligence in the matter of notice. This instruction apparently recognizes that fact, but states the requirement of notice in such a way as to suggest that, as a matter of law, notice must precede the closing of the road. That took from the jury the question, presented by the evidence, of the sufficiency of the notice to which plaintiff testified; that is the notice given by the boards in the fence and the notice posted that day on the post, all of which was to be considered in relation to the amount and kind of travel over the said way. If it did not appear that the way was used in the nighttime, a notice would be sufficient, which would otherwise not be so.

These instructions are as likely to mislead the jury as to aid them, and the one last considered was positively misleading.

The jury should have been instructed that defendant's liability for damages depended upon whether or not, in erecting said fence, he exercised such care, by way of its construction, and in the notice of its presence, as an ordinarily prudent person would exercise, under the same or similar circumstances. The circumstances, of course, include the extent of the use of said way, and what defendant knew or should have known of such use, and the fact that persons using the road were trespassers, unless shown by the evidence to be licensees.

For error in the instructions, the judgment is reversed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9413.

BREWER v. BREWER'S ESTATE.

1. COMMON LAW MARRIAGE—*Evidence.* The evidence examined and held to establish a common law marriage.

2. DESCENTS AND DISTRIBUTIONS—*Common Law Wife*, inherits from the husband.

Error to Weld County Court, Hon. Herbert M. Baker, Judge.

Mr. R. E. WINBOURN, for plaintiff in error.

Mr. G. H. BRADFIELD and Mr. L. B. REED, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

ON January 18, 1918, a verified petition for determination of heirship in the matter of the estate of Joseph W. Brewer, deceased, was filed in the County Court of Weld County, Colorado, by a brother of the deceased. Three brothers and one sister, and no one else, were named in the petition as all persons who are or claim to be the heirs of the decedent. On February 15, 1918, one Laura Brewer filed her verified answer to the petition, claiming that she is the widow of Joseph W. Brewer, deceased, and as such widow is the sole and only heir at law of such decedent. Thereafter a hearing was had upon the petition and the answer, and the court dismissed the claim of Laura Brewer, and found that the heirs of Joseph W. Brewer, deceased, are those named in the petition. Subsequently a motion for a new trial was interposed and overruled, and a decree entered in accordance with the finding above mentioned. The claimant, Laura Brewer, brings the proceedings here for review.

The decree was, in effect, a determination that the plaintiff in error, Laura Brewer, was not the widow of Joseph W. Brewer, deceased, and never had been his wife. The only question necessary to be determined is whether or not the decree is manifestly against the weight of the evidence, in the respect above mentioned. It is admitted by the plaintiff in error that there had never been any marriage ceremony between her and the deceased, and that whatever claim she has to being the widow of the decedent is by virtue of a common law marriage.

The testimony proving, or tending to prove, a common law marriage of the parties in question, was not contradicted. In May, 1913, Joseph W. Brewer, then residing in the City of Denver, came to the home of the plaintiff in error, in the same city, and stated to her that he wanted her to be his housekeeper and his wife. Thereupon the latter, with her two children by a former marriage, removed to the former's house, and the parties began to live together, residing in Denver until April, 1914, when they removed to a homestead in Weld County. Upon arriving at the homestead, they lived at a neighbor's home, staying there a short time or until they constructed a dwelling on their own land. Thereafter they resided upon the homestead until the time of the death of the decedent, which occurred in January, 1917. During all of the time that the plaintiff in error and Joseph W. Brewer, now deceased, lived together, they did so ostensibly as husband and wife, and demeaned themselves toward each other as such. They were regarded and treated as husband and wife by their acquaintances and friends. They lived in the same dwelling house, and in all respects shared the same rooms therein. Their cohabitation was constant and exclusive, and in every way indicative of the marriage relation. It was an association, consciously and openly, as husband and wife. The claimant was known as Mrs. Brewer. The deceased both directly and indirectly, at different times, admitted or represented that Laura Brewer, the plaintiff in error, was his wife. The uncontradicted testimony may be summed up in the statements above made. The facts herein thus stated clearly prove that a valid common law marriage subsisted between the plaintiff in error and Joseph W. Brewer at the time of his death. *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049; *Klipfel's Estate v. Klipfel*, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 26; *Estate of Matt-eote*, 59 Colo. 566, 569, 151 Pac. 448; *Smith v. People*, 64 Colo. 290, 170 Pac. 959.

The trial court's finding was manifestly against the weight of the evidence. The decree is reversed and set

aside, with directions to enter a decree finding that Laura Brewer is the widow and the sole and only heir at law of Joseph W. Brewer, deceased.

Reversed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9779.

KNIGHT v. THE PEOPLE.

CRIMINAL LAW—*Costs.* Sec. 3877 of the Revised Statutes has no application to a trial in the County Court on appeal from a conviction before a justice of the peace. The prosecuting witness cannot be adjudged to pay the costs of the prosecution.

Department One.

Error to Huerfano County Court, Hon. Joseph H. Patterson, Judge.

Mr. A. W. MCHENDRIE and Mr. GEORGE H. BLICKHAHN, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. CHARLES ROACH, Deputy, for The People.

Mr. Justice Burke delivered the opinion of the court.

Two criminal complaints were filed in Justice Court against Louie Watta, one charging an assault and battery upon plaintiff in error, and sworn to by him; the other charging an assault and battery upon one Art Gregory, and sworn to by some person whose name is not disclosed by the record. Watta was there tried and convicted upon both charges and appealed both to the County Court, where the Gregory case was dismissed by the District Attorney. The other went to trial and the following verdict was returned. "We the jury find the defendant not guilty. With the costs of case assessed against prosecuting witness in case." Thereafter the court entered judgment against plaintiff in error for the total costs of both cases in both

courts. Plaintiff in error then appeared by counsel and moved to vacate and set aside this judgment. The motion was denied. From that ruling this writ is prosecuted and the cause is now before us on application for supersedeas. "Independently of statute the prosecutor is under no circumstances liable to pay any costs." 15 C. J., 320. "Inasmuch as the prosecutor's liability is dependent solely on statute, the payment of costs can not be imposed on him except in such proceedings or prosecutions as are designated by statute." 15 C. J., 321.

The only statute in Colorado under which any claim to enter the judgment here in question could even be seriously argued is the following: "In all criminal prosecutions before a justice of the peace, where the party accused shall be found not guilty, and it shall appear to the justice before whom such case shall be tried that there was no reasonable ground for his prosecution, and that it was maliciously entered, in such case the justice of the peace is hereby authorized to give judgment against the complainant for the costs of said suit, and issue execution thereon." Sec. 3877, R. S. 1908. This statute has no application to a trial in the county court. Even were it otherwise it could be no justification for the judgment in the instant case. The verdict of guilty returned by the jury in the Justice Court settled the question of probable cause for the prosecution, so far as plaintiff in error is concerned, and was a vindication of his action. *State v. Hodgson*, 79 Iowa 462, 44 N. W. 708. Upon this ground the Attorney General confesses error and there can be no doubt about the propriety of that confession.

The judgment is accordingly reversed.

Garrigues, C. J. and Teller, J., concur.

No. 9476.

COCQUYT v. SHOWER.

1. PRACTICE IN ERROR—*Finding on Conflicting Evidence*, is not to be disregarded.
2. BROKER—*Duration of Agency*. The law presumes that the agency of a broker employed to sell lands will continue only for a reasonable time, to be determined by a consideration of the nature of the contract, the circumstances attending its execution, and all the circumstances of the case.

At the time of the employment of the broker certain prospective investors were expected, and the time of their arrival, and the time to be given them for consideration was discussed.

The subject matter of the agency was not only a valuable ranch, but young livestock, increasing in value, and the broker not having produced a purchaser until the lapse of a year from his employment, and the land owner having in the meantime broken up and planted fifty acres of new land, *held* that the agency had expired.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Department One.

Mr. C. W. DARROW, for plaintiff in error.

Mr. JOHN L. NOONAN and Mr. J. W. DOLLISON, for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANTS in error recovered judgment in an action against the plaintiff in error for a broker's commission, alleged to have been earned by the sale of a ranch under a written contract of agency. The complaint set out the contract, which was dated August 19, 1916, and which authorized the agent to sell a ranch at a price named, on a commission of five per cent. No time was named in the contract for the continuance of the agency. On the back of the contract was a memorandum of "44 head of cattle \$2,000, 7 head of hogs \$1,000, machinery, etc., \$1,000, 25

hogs, some chickens, and crops on the place." It is conceded that the property above listed was included in the property to be sold.

It appears that on the 18th of August 1917, defendant in error, Shower, went to the ranch with one Smith, a prospective buyer, and that after looking over the place, Smith offered to pay \$12,000 cash and assume a \$3,000 mortgage on the place, which sum aggregated the purchase price named in the contract.

For the defense, it is contended that the contract of agency was for a reasonable time only, and that under the circumstances of the case one year was more than a reasonable time for making the sale. It is also urged that the evidence shows that when the agent and the prospective buyer visited the place, the plaintiff in error, before Smith had announced his willingness to purchase, declared that he would not sell, and that the agent had no authority to sell, thereby revoking the agency.

Shower testified that this refusal to sell was not announced until Smith had agreed to buy. Smith's evidence sustains that of the plaintiff in error, but there being a conflict in evidence, and the trial court having found in favor of the plaintiff below, we are not at liberty to disregard his findings in that respect.

The first mentioned objection, however, presents a question of law; the rule being that where a contract does not fix the time of performance, it is for the court to determine what is a reasonable time for such performance. *Denver Co. v. Doyle*, 58 Colo. 327, 145 Pac. 688, L. R. A., 1915 D, 113, 9 Cyc. 614. That the law presumes in a case like this that agency will continue only for a reasonable time, is well settled. *Walling v. Warren*, 2 Colo. 434; *Nunez v. Dautel*, 19 Wall. 560, 22 L. Ed. 161. What is a reasonable time must be determined from a consideration of the nature of the contract, the circumstances under which it was executed, and all the circumstances of the case. *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267. The duty of the court is to determine from the undisputed facts and contract

itself, what was within the contemplation of the parties when they made the contract.

If this contract covered only the sale of the land, it might, perhaps, reasonably be contended that the agency would continue until its purpose had been performed, or the contract had been cancelled. The fact, however, that this contract contemplated the sale with the farm of personal property of large value, and likely to change in value, including crops on the place, presents a different question. It is hardly to be presumed that the owner of the property intended to tie his own hands as to the personalty for any considerable period of time. The livestock, as appears from the evidence, was all young and increasing in value. The owner could not sell, by a binding contract, nor could he authorize the agent to sell crops not yet planted. *First National Bank of Montrose v. Felter*, 65 Colo. 370, 176 Pac. 496. The parties are presumed to know the law, and therefore they could not have contemplated that the agency should cover crops grown in 1917. It appears that plaintiff in error at least did not construe the contract as covering the crops for the next year. This is evidenced by the fact that, according to undisputed testimony, he expended something over \$500 in preparing new ground (some fifty acres) and putting a crop thereon in the spring of 1917.

The record discloses that when the contract was secured the agent had in view a visit to the locality of certain prospective investors from Denver, and that the time of their arrival and the time which should be given them for consideration of the purchase, were both discussed by the parties. In *Alford v. Creagh*, 7 Ala. App. 358, a somewhat similar state of facts was presented. It was there held that, when the expected parties, after a reasonable time, had failed to appear, the contract was at an end. We do not, however, put the termination of the contract in this case upon that ground. We are of the opinion that, under the circumstances shown in evidence, the parties could not have contemplated an agency to continue after the planting of crops for the year 1917. The agency, there-

fore, had expired at the time that the defendant in error and Smith visited the ranch, and the question as to whether or not the agency was revoked before Smith made his offer, is eliminated. There being no contract existing at that time, the plaintiff in error was under no obligation to compensate the agent for securing a person willing and able to purchase.

The judgment is accordingly reversed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9150.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.
v. THE PUBLIC UTILITIES COMMISSION, ET AL.

1. REVIEW OF FINDINGS OF UTILITIES COMMISSION—*Jurisdiction of Supreme Court.* Under the statute the Supreme Court is authorized to set aside or modify the order of the Commission, if not supported by the evidence; but not to revise findings of fact upon conflicting evidence.
2. JURISDICTION OF COMMISSION, The local service of a Public Utilities Corporation doing business at Denver is controlled by the City, and not by the Utilities Commission. The local freight service, i. e., hauling between points within the switching limits of the Denver yards is therefore beyond the jurisdiction of the State Commission.
3. *Considerations Controlling the Commission.* In determining the reasonableness or unreasonableness of the carrier's charge, switching ought not to pay all the interest and taxes upon the terminal property, because the property is devoted to switching only in part, and is in fact part of the line. Each of the several uses to which the terminal and its facilities are devoted should bear a fair proportion of the terminal expense.

En Banc.

Mr. HENRY T. ROGERS and Mr. GEORGE A. H. FRASER, Attorneys for A. T. & S. F. Ry. Co., Mr. E. N. CLARK, Attorney for D. & R. G. R. R. Co., Mr. C. C. DORSEY and Mr.

J. Q. DIER, Attorneys for Union Pacific R. R. Co., Mr. E. E. WHITTED, Attorney for C. B. & Q. R. R. Co. and C. & S. Ry. Co. and Mr. HOWARD S. ROBERTSON, Attorney for Denver & Intermtn. R. R. Co., for petitioners.

Mr. J. W. KELLEY, attorney for Respondents, Mr. CARL WHITEHEAD and Mr. ALBERT L. VOGL, Attorneys for Consumers' League of Colo. et al., for respondents.

Mr. Justice Denison delivered the opinion of the court.

CERTAIN shippers brought suit before the Public Utilities Commission to reform the switching rates in the Denver Railway Yards. The Commission reduced the rates and the Railway Companies seek to review that order under section 52 of the Act of 1913; S. L. 1913, pp. 497-498.

Under that section "the findings and conclusions of the commission on disputed questions of fact" are "not subject to review," but since the same section permits us, among other things, to determine "whether the order of the commission is just and reasonable and whether its conclusions are in accordance with the evidence" we conclude that the intent of the legislature was to empower us to set aside or modify the orders of the commission if they were based on propositions of fact in support of which there was no evidence, but not to review findings of fact upon which the evidence was conflicting.

The complainants charged before the commission that the rates were unjust and unreasonable, which was denied. This issue was the principal matter of fact which was tried, all other questions of fact being important only so far as they bore one way or other on this point. The commission found that the rates were unjust and unreasonable, and fixed lower rates, partly on the ground that the line haul ought to bear a part of the cost of switching.

The carriers argue that the commission's findings are unsupported by the evidence, because there is no evidence from which it can be determined what the line haul ought to bear. It is true there is no direct evidence on that point but there are the switching rates in other terminals which were before the commission. The Interstate Com-

merce Commission has regarded such evidence as of weight. *Spiegle v. So. Ry.*, 25 I. C. C. 71; *Switching at Sheffield*, 26 I. C. C. 475; *Am. Creosote Works v. I. C. R. R.*, 18 I. C. C. 212; *Trans. Bureau v. G. & N. Ry.*, 30 I. C. C. 683. So this court, *Kindel v. C. & S.*, 57 Colo. 1, 139 Pac. 1105, and there was testimony that the industrial switching rates (*i. e.*, rates for transportation from one industry to another within the Denver Yards) were higher per ton than automobile drayage.

Upon the question of the sufficiency of the evidence we ought to consider that the facts concerning the line-haul, cost of operation, value of property devoted thereto, taxes, etc., are "peculiarly within the knowledge of the carriers" (57 Colo. 9), so they are not in as strong a position to urge the insufficiency of such evidence as has been procured against them as if all possible evidence as to the justness of the rates had been laid before the commission.

We cannot say that the findings are wholly unsupported by evidence, and therefore we cannot review them. We notice, however, some of the points made against them.

The railways claim that the rates fixed by the commission are unreasonable because they require the service to be performed at a loss, and they present figures, which are undisputed, except to an extent too small to affect the result, which show that the rates so fixed will not pay the cost of the operation of switching, plus six per cent on the value of the property devoted to switching, plus taxes thereon.

The commission, however, takes the ground that the switching does not elsewhere, and ought not to, pay all the interest and taxes on such property but that the line haul ought to bear a part of that burden, because the property devoted to switching is a part of the terminal facilities in use with and really a part of the line itself.

In this we think the commission is right. No line could be operated without some terminal facilities, even though no switching were done there except just enough to care for the rolling stock and make up trains. In *re Louisville &*

Nashville Rates, 26 I. C. C. 20; Lighterage Charges, 35 I. C. C. 47; Switching Charges, Milwaukee, 32 I. C. C. 509; *Steenerson v. Great Northern*, 69 Minn. 353, 72 N. W. 713; *Billings Chamb. of Commerce v. C. B. & Q.*, 19 I. C. C. 71.

The petitioners urge that the rule that the line haul should produce part of the revenue due to the terminal property used for switching compels the companies which own the terminal to do switching for foreign companies at less than cost. We do not think so. Might it not as well be said that the Union Station is maintained and furnished at less than cost (viz. gratis), to the through passengers from foreign connecting lines?

It is not at less than cost if the terminal is considered as partly belonging to the main line and operated and maintained partly by the revenue from the line haul. The figures presented by the railways show that even before the commission's reduction, according to their present method of computation, they were switching at less than cost. They themselves, then, have not heretofore followed the rule they now urge upon the commission and this court.

We have recently held that the local service of a public utility corporation is controlled by the city and not by the Public Utilities Commission. *Denver v. Mtn. States Telephone & T. Co.*, 67 Colo. 225, 184 Pac. 604.

The local freight service, that is, hauling between points within the switching limits of the Denver yards, is called "industrial switching." (If our understanding is correct, it constitutes a small percentage, say ten per cent., of the switching in the Denver yards.)

By force of the above decision, then, that part of industrial switching which is carried on between points within the City and County of Denver is beyond the jurisdiction of the State Commission, and as to it the order of the Commission should be reversed.

Neither side suggested this point either to the commission or to this court; but, because it is a jurisdictional question, we deem it proper to notice it.

The order of the Commission, so far as it relates to industrial switching between points within the City and County of Denver, should be reversed. So far as it relates to other matters, it should be affirmed.

Teller, J., dissents as to part *reversed*.

Scott, J., specially concurring.

I agree with the conclusion reached in the opinion that the commission had no jurisdiction in the premises, because of the recent decision in the case cited. I do so for the sole reason that I am bound to accept that decision as the law in this state, for I am as strongly convinced as I was at the time that the decision was rendered, that it is in direct conflict with every other of the very many decisions of the state and the United States courts. The error in the conclusion there reached constitutes the gravest injustice to the people and the public welfare, in my judgment, and I am willing and ready to vote to overrule it at the first opportunity. This case illustrates but one of the many wrongs that the decision must enforce against the public.

Here the justice of the order of the commission reducing the rates to be charged by the carriers is conceded, and yet the public are to be denied relief, for confessedly, there can be no other practical remedy, and the people of the cities of this state operating under the Twentieth Article of the Constitution are thus left at the mercy of the carriers.

It is inconceivable that the people of this state, either by constitutional or statutory enactment could have intended such gross discrimination and injustice.

On Motion for Rehearing.

En Banc.

Denison, J.

It may be admitted to be true, as the United States Supreme Court says in 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824, that if the terminal charge is reasonable, the fact that it and the line haul together are unreasonable will not justify a reduction of the terminal charge.

What we are trying to do here, however, is to determine whether the terminal charge is reasonable, and there is nothing in the above admission to prevent the consideration of the line haul charge in determining the terminal charge.

It seems manifest that each of the several uses to which the terminal and its facilities are put should bear a fair proportion of the terminal expense.

The uses to which the terminal and its facilities are put are at least three—

1. Industrial switching.
2. Reciprocal switching.
3. Other uses necessary to the line haul operation.

Maintenance, interest, taxes and a reasonable net revenue must be yielded by the terminal.

The proposition of the carriers is that 1 and 2 should yield enough to cover them all.

Why should certain switching alone be required to pay all the expense and produce a reasonable revenue on this terminal when the line haul is using it too and the companies may be and presumably are (186 U. S. 337) charging for that use? The question answers itself.

But the companies insist that the question of the line haul charge was not before the commission, that therefore they were not to be expected to and did not offer any evidence as to that charge.

Since, as we have shown above, the line haul charges were relevant to the question of the reasonableness of the reciprocal switching charges, the companies might and ought to have offered proof as to the former.

So far as the commission's findings of fact are concerned, on the evidence before it, we have seen that we cannot review them. Rehearing should be denied.

No. 9354.

HILLE, ET AL. v. EVANS.

1. **JUDGMENT—Record—Effect.** The record of a judgment by default reciting the production of evidence sufficient to sustain the complaint is conclusive upon this question.

The recitations of the record were held further supported by an order allowing fees to the attorneys of the plaintiffs, pursuant to a provision of the notes which were the ground of the action.

2. **FRAUD—Evidence.** Judgment by default upon certain promissory notes of a corporation. Petition to vacate the judgment, for fraud in procuring the notes. The evidence examined and held to dispel the accusation of fraud.

3. **PRACTICE IN ERROR—Discretion.** The court will not interfere with discretionary action, except in a clear case of abuse.

4. **CORPORATIONS—Transactions With Directors.** The lending of money to a solvent corporation by the directors thereof is not illegal.

5. **JUDGMENT—Petition to Vacate,** not filed till three months after its entry, and thirty days after execution issued, *held* too late.

6. **Evidence.** Promise of a creditor not to press his claim, made without consideration, is no ground to vacate a judgment by default based upon such claim.

The promise of a stockholder in a corporation not to press a claim against the corporation, "to the detriment of other stockholders", depends upon so many uncertainties that a litigant relies thereon at his peril.

7. **Admission of Validity of Part of the Indebtedness—Effect.** Where the petition to vacate a judgment by default admits the validity of a portion of the indebtedness upon which such judgment is founded, the petitioners should offer payment, or permit judgment for what is so admitted.

8. **Motives of Creditor.** Where neither the right of recovery nor the propriety of the procedure is disputed, the courts will not concern themselves with the creditors' motives.

9. **EVIDENCE—Offer of Proof—Presumptions.** It is presumed that one making an offer of proof sets forth the evidence proposed to be produced, in substance, and not in detail.

An offer to prove that a judgment by default was entered without verification of the complaint, evidence of the verity of the promissory notes upon which it was based, the assignment of certain of them which had been assigned to plaintiff—all the papers referred to being present in court and the authenticity thereof not denied, was held wholly insufficient.

Error to Denver District Court, Hon. John A. Perry, Judge.

En Banc.

Messrs. QUAINANCE, KING & QUAINANCE, for plaintiffs in error.

Mr. EDWIN H. PARK, Mr. THOMAS H. GIBSON, and Mr. RICHARD PEETE, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

ON September 12, 1917, John E. Evans, defendant in error, brought suit against The Copper King Mines Products Company on fifteen promissory notes, two of which were made payable to him, six to William Kelly, two to Jasper N. Wyman, three to Andrew B. Crichton and two to E. E. Lloyd, all executed and delivered by plaintiff in error, The Copper King Mines Products Company, and of all of which said Evans alleged he was the owner and holder. Evans and the company are hereinafter designated as in the court below. Summons was regularly issued and served and October 5, 1917, default was taken against defendant and judgment ordered and entered. January 5, 1918, A. W. Hille, A. L. Briggs, R. S. Williams, W. W. Bingham and John R. Wood (hereinafter referred to as "Petitioners") moved to set aside said default and judgment, recall executions theretofore issued and permit the petitioners (stockholders in defendant company) to defend. January 19, 1918, plaintiff answered the petition to set aside the judgment. January 28, 1918, all the parties appeared before the court and petitioners made certain offers of proof, which were rejected. January 29, 1918, an amended petition was filed, and an answer to the original complaint, as a supplemental petition, and supporting affidavit, and a verified

petition in intervention were tendered. January 31, 1918, the original petition to vacate, as well as the supplemental petition, and petition in intervention, were dismissed "with prejudice to relitigate the matters alleged in the same, otherwise than in a proper suit in equity." The judgment thereby became final and from the order of the court so made petitioners prosecute this writ.

Burke, J. after stating the facts as above.

Petitioners in their reply brief say, "But we do wish to confine the argument in this court to the one question involved, that is, whether or not the lower court should have set aside the judgment and allowed us to go to trial on the merits." The argument should have been so confined, as that is the sole question for our determination.

The right of petitioners to have the judgment in question set aside depends upon their having properly pleaded one or more of the three grounds upon which they base that right. First, that the judgment is void because illegally entered: Second, fraud in the execution and delivery of the notes, or in contracting the indebtedness: Third, the court's abuse of discretion in denying the petition.

First. It is alleged that the judgment was erroneously entered by the clerk on default on an unverified complaint. Sec. 168, Code of Civil Procedure. *Glidden v. Packard*, 28 Cal. 649. *Freeman on Judgments*, Sec. 533. That it is therefore void and should be set aside, irrespective of a sufficient defense being set up in the answer. The record in this case however not only fails to show that this judgment was entered without evidence, and by the clerk on default, but expressly establishes the contrary. The order of October 5, 1917, for entry of judgment, recites that sufficient evidence being produced in support of the complaint herein it is ordered by the court," etc. This record is conclusive. *Co. Court v. The People*, 55 Colo. 258-261, 133 Pac. 752; *Gaboury v. Smith, et al.*, 18 Colo. App. 19, 69 Pac. 275; *Carr v. Willoughby & Co.*, 36 Colo. 358, 85 Pac. 428. It is further supported however by the fact that while ten of the notes called for ten, and one for fifteen, per

cent attorney's fees, and four made no provision, a flat fee of \$1,000 was allowed instead by the court and included in the judgment. That the notes themselves were put in evidence is sufficiently established by petitioners' offer to prove "that plaintiff's attorney appeared and handed certain notes, purporting to be the notes sued on, to the clerk." It is nowhere denied that these were the notes sued on nor is there any denial as to the genuineness of the signatures, hence it appears that the entry of default and judgment were in all respects regular and legal.

Second. Petitioners next contend that they have pleaded fraud in the execution and delivery of these notes; that the judgment is thereby shown to be based upon a fraudulent transaction, and should be set aside. Conceding, but not deciding, the correctness of this conclusion we find no sufficient plea of fraud to support it. It is not disputed that the notes in question were given for money advanced the company. There is no claim that these funds were not received by the corporation, or that they have been repaid, but it is contended that there was an attempt on the part of the plaintiff and other officers and stockholders of the corporation to wreck it; that its mismanagement by them was for that purpose and brought about the conditions necessitating the advances represented by these notes; that the notes were given as mere memorandums of the corporation's contract to repay the indebtedness when the funds necessary therefor had been realized by the wise and economical management of the company's affairs promised by plaintiff and his associates; and that in violation of this contract, and in fraud of the corporation and its stockholders, these so-called memorandums of indebtedness were sued upon as promissory notes; and that "none of your petitioners have consented to or acquiesced in the acts here-is complained of." But the alleged mismanagement must have occurred after April 2, 1917, on which date five of these notes were executed and delivered. Four others were executed and delivered at dates prior thereto, leaving but six so executed and delivered after April 2, 1917, on

which last mentioned date it is alleged plaintiff and his associates assumed control of the corporation and began its mismanagement. All of these notes are signed by one or more of the individual petitioners as officers of the corporation. Having participated in the transaction they can not impeach their integrity. *Boldenweck v. Bullis, et al.*, 40 Colo. 253, 90 Pac. 634. The admitted circumstances of the execution and delivery of these notes are wholly inconsistent with the allegation that they were memorandums of indebtedness, and that allegation is entirely nullified by the fact that nine of these notes expressly provided "If not paid at maturity and collected by an attorney or by legal proceedings an additional sum of ten per cent on the amount of this note as attorney's fees." The court was clearly correct in refusing to set aside this judgment on the ground of fraud in the original transaction.

Third. The petition to vacate the judgment was addressed to the sound discretion of the court. *Hollingsworth v. Ring*, 26 Colo. App. 121-126, 141 Pac. 139; *Bunnell v. Holmes*, 64 Colo. 345, 171 Pac. 365-366. This court will not interfere with the exercise of that discretion except in a clear case of abuse. *Bannerot v. McClure*, 39 Colo. 472-479, 90 Pac. 70, 12 L. R. A. (N. S.) 126; *R. E. L. S. M. Co. v. Englebach*, 18 Colo. 106-112, 31 Pac. 771. We are unable to indulge the presumption of any such abuse of discretion from anything to be gathered from these pleadings. Of the numerous reasons urged why we should do so we will notice only the more important.

It is urged against the notes in suit that they represent money borrowed by the corporation from its directors. Where, as appears here, the corporation was solvent at the time of the transactions, such contracts are not illegal. *Burns v. National Co.*, 23 Colo. App. 545, 130 Pac. 1037; *St. Joe, etc., Co. v. Bank*, 10 Colo. App. 339, 50 Pac. 1055; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

Petitioners allege that they have been unable to ascertain the true state of the affairs of the company since April 2, 1917. Since it appears that for almost four months

after that date the petitioner Wood continued as Secretary-Treasurer of the corporation, presumably in possession of its books and accounts (and this he does not deny) such allegation is entitled to small consideration.

Petitioners maintain that they have exercised due diligence in their proceeding to set aside this judgment. The petition to vacate was not filed until three months after the entry, nor until thirty days after the issuance of execution. A less delay has been held sufficient to justify a denial of relief. *Hollingsworth v. Ring, supra.*

Petitioners plead that they were in court "with witnesses to show to the court all facts concerning the judgment and the defenses to the notes" and that the court's refusal to permit them to introduce this evidence was error. It is not presumed that counsel, in an offer of proof, sets the same forth in detail, but it is presumed that, in making the offer, he sets it forth in substance. *Hughes v. Leonard*, 66 Colo. 500, 181 Pac. 200. In the instant case such an offer was made in open court. That offer was merely to prove "that said judgment was entered without any oath or verification being made to the complaint (the complaint was before the court and spoke for itself), or to the signatures on the notes sued on (the signatures were not denied), or as to the alleged assignment thereof (the notes were in evidence and show the assignment), and that the only proceeding had was that plaintiff's attorney appeared and handed certain notes purporting to be the notes sued on (that they were such is not denied) to the clerk." It is unnecessary to further point out that this offer was wholly insufficient.

Two reasons are set forth in these pleadings as a justification for petitioners' failure to defend this action. First, the alleged promise of plaintiff and his associates to refrain from further pressing their claims until funds could be raised from the sale of stock for the payment thereof. Second, the assurance of the payees of said notes that they "did not intend to sell the property of the company and freeze out the other stockholders", and that "they would

not press their claims *to the detriment of the other stockholders.*"

The alleged agreement to refrain from pressing the claims presupposes their validity, and the promise of forbearance was without consideration. *Peachy v. Witter, et al.*, 131 Cal. 316, 63 Pac. 468. Whether obtaining a judgment and selling the property of the company to satisfy it would be "to the detriment of the other stockholders", or the result of the sale would be to "freeze out the other stockholders", was a mere matter of opinion and depended upon so many considerations that such a promise can neither be construed into a promise not to press the suit, nor a promise not to satisfy the judgment. Litigants rely upon such declarations at their peril. *Snipes v. Jones et al.*, 59 Ind. 251.

It is alleged that when Wood, as Secretary-Treasurer of the corporation, reported that he had been served with summons, plaintiff and his associates represented that they would not press the suit, and that it was not defended because petitioners relied upon such representations. Also that the stockholders directed the employment of counsel to defend the action. These are entirely inconsistent allegations.

Petitioners further plead "that the company has and had a valid defense to about \$15,000 (out of a total of almost \$30,000) if not all, of the notes upon which the judgment herein is based." This is a tacit admission at least of the validity of the remainder of the indebtedness represented by the judgment. As to that remainder petitioners should have offered to make payment, or permit judgment to be taken against them, before they were entitled to the relief sought. This they did not do. *Mosher et al. v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742.

It is contended that the purpose of the present suit was to enable the plaintiff and his associates to freeze out other stockholders and secure control of the company. Where the legal right of recovery and the proper method of procedure are undisputed the courts will not concern them-

selves with the question of the creditor's motive. *Jenkins v. Fowler*, 24 Pa. 308.

A careful review of this entire record disclosing neither a sufficient plea of a void judgment, nor fraud in the execution and delivery of the notes in suit, nor any abuse of discretion on the part of the trial court in refusing to set the judgment aside, it is hereby affirmed.

Decided Jan. 5, A. D. 1920. Rehearing denied July 2, A. D. 1920.

No. 9415.

WILSON, ADMINISTRATRIX v. DENVER & RIO GRANDE
RAILROAD COMPANY.

PLEADINGS—Amendment. In an action by the widow of a railroad employe for the death of her husband, it developed that the railway company was engaged in interstate commerce, so that no action lay by the widow, but solely by the personal representative. The cause being remanded, the widow, having been meantime appointed administratrix was permitted to amend her complaint, alleging her representative capacity, and the interstate character of the railway company.

Error to Chaffee District Court, Hon. James L. Cooper, Judge.

Mr. G. K. HARTENSTEIN and Mr. HARRY L. MCGINNIS, for plaintiff in error.

Mr. E. N. CLARK, Mr. T. M. STUART and Mr. RALPH G. LINDSTROM, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS action was commenced by the plaintiff as widow to recover damages for the alleged negligent killing of her husband, an employe of the defendant in error. Judgment was recovered and upon review this judgment was set aside. *Denver v. Rio Grande R. R. Co. v. Wilson*, 62 Colo. 492, 163 Pac. 857.

It developed on the former hearing that the defendant was at the time engaged in interstate commerce, and it was held by this court that recovery could not be had by plaintiff as widow of deceased as provided by the Colorado statute, but that the action must be by a personal representative of the deceased, as provided by the Federal Employers Liability Act, under which act alone the action may be prosecuted.

In the District Court, the plaintiff was permitted to and did amend her complaint in the material particulars only, that the amended complaint fixed the relationship of the plaintiff to the deceased as administratrix of the estate, instead of as widow, to comply with the Federal statute in that respect, and with the further allegation that the defendant was engaged in interstate commerce at the time of the accident. In all other material particulars the amended complaint is the same as the original complaint in the statement of facts.

The defendant moved to strike the amended complaint from the files upon the following grounds: "That said amended complaint pleads a cause of action which arises under and solely by virtue of the provisions of an Act of Congress of the United States known generally as the Federal Employers' Liability Act; that said cause of action so plead in said amended complaint is a new, different, independent, separate and distinct cause of action from that plead in the original complaint in this action and is brought by a different party plaintiff; that said amended complaint attempts by way of amendment to plead a new, different, independent, distinct and separate cause of action from that plead in the original complaint." This motion was sustained and the cause dismissed, the court holding that the amended complaint constituted a new cause of action, and was therefore barred by the two years' limitation provided in the Federal Statute. This judgment is before us for review.

On the former hearing we said: "The death of plaintiff's husband, through the negligence of defendant, its

officers, agents or servants, constitutes the cause of action, if any. If the facts establish a case the defendant would be liable in damages therefor either to the plaintiff in her individual capacity, or to the personal representative of deceased, depending in that regard upon whether the employe was at the time engaged in *intra* or interstate commerce. It has been held that a plaintiff suing in her individual capacity under the state law, may amend her complaint by making herself a party plaintiff as the personal representative of deceased and alleging the cause of action under both the state and federal statutes. *Missouri, etc., R. R. Co. v. Wulf, supra; Koennecke v. Seaboard Ry. Co., supra; Vaughn v. St. Louis & S. F. R. Co., supra.*

In the instant case, however, there was no attempt to amend the complaint and the question, therefore, is not before us for determination. If the plaintiff has rights in that regard she is not to be foreclosed by that which is said herein." This must be held to be the law in this case, and therefore we must hold as there declared, that the death of plaintiff's husband, through the negligence of defendant, its officers, agents, or servants, constitutes the cause of action, and that if the facts establish a case, the defendants are liable in damages therefor, either to the plaintiff in her individual capacity, or to the personal representative of deceased, depending in that regard upon whether the employer was at the time engaged in intra-state or inter-state commerce. The facts alleged in the amended complaint being identical with the facts in the complaint there considered, must under such ruling be held to be the same cause of action, and not a new and different cause of action as contended by the defendant in error. The cases cited in the former opinion are conclusive of the question.

In *M. K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Am. Cas. 1914B, 134, cited, the action was instituted in the United States Circuit Court, and as in this case, reliance was had on the state statute. The court allowed an amendment of the petition so as to permit the plaintiff to appear as the per-

sonal representative of the deceased. The Supreme Court, speaking through Mr. Justice Pitney, said: "The argument for reversal rests wholly upon the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died, unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. *Second Employers' Liability Cases*, 223 U. S. 1, 53. There-

fore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American Railroad Co. v. Birch*, 224 U. S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us; an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within § 954, Rev. Stat.

Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by § 6 of the Employers' Liability Act. The change was in form rather than in substance. *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 445. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit. *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 603; *Atlantic & Pacific R. Co. v. Laird*, 164 U. S. 393, 395. See also *McDonald v. State of Nebraska*, 101 Fed. Rep. 171, 177, 178; *Patillo v. Allen-West Commission Co.*, 131 Fed. Rep. 680; *Reardon v. Balakala Consol. Copper Co.*, 193 Fed. Rep. 189."

To the same effect is: *Phifer v. Abbott*, 69 Fla. 162, 67 South. 917; *Pugmire v. Diamond Coal Co.*, 26 Utah 115, 72 Pac. 385; *Myers v. Chicago R. Co.*, 152 Iowa 330, 131 N. W. 770; *Schneider-Davis Co. v. Brown* (Tex. Civ. App.), 46 S. W. 108; *Burlington Voluntary Relief v. Moore*, 52 Neb.

719, 73 N. W. 15; *Wood v. Lenawee Circuit Judge*, 84 Mich. 221, 47 N. W. 1103; *Vaughan v. St. Louis & S. F. R. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Hardy v. Woods*, 33 S. D. 416, 146 N. W. 568, Ann. Cas. 1916C, 398.

The judgment is reversed with instructions to proceed in accordance with the views herein expressed.

Garrigues, C. J. and Denison, J. concur.

No. 9425.

ENDERMAN v. ALEXANDER.

1. **STATUTES—Construction.** Provisions contained in a statute relating to civil actions will not be construed to extend to criminal prosecution.
2. **COSTS—In Criminal Prosecutions—Exemptions.** Sec. 3628 of the Revised Statutes relates solely to costs accrued in civil actions.

Error to La Plata District Court, Hon. W. N. Searcy, Judge.
En Banc.

Messrs. PERKINS & PERKINS, for plaintiff in error.

Mr. GEORGE W. LANE, Mr. JOHN B. O'ROURKE and Messrs. RUSSEL & REESE, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

THIS was an action by plaintiff in error against defendant in error under sec. 3634, Rev. Stat. 1908, for damages in the sum of \$705.00 for sale, under execution, of certain of plaintiff's property claimed by him as exempt. The amount prayed for is three times the value of the property so sold. The execution in question was issued on a judgment against plaintiff, and in favor of the people, for the costs of a certain prosecution in which plaintiff was convicted of burglary. The judgment in the instant case was entered on the pleadings, on defendant's motion. Allegations which, under the motion must be taken as true, bring

plaintiff, and the property in question, within the terms of sec. 3628, Rev. Stat. 1908 (if applicable) which exempts from "sale upon any execution" * * * "working animals to the value of two hundred dollars" * * * "owned by any person being the head of a family and residing with the same" * * * and "the tools and implements * * * used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."

Burke, J., after stating the facts as above.

The sole question for our consideration is "Does said sec. 3628, have any application to an execution issued in favor of the people to satisfy a judgment of fine or costs in a criminal case?"

Our statute governing executions in criminal cases provides: "The property, real and personal, of every person who shall be convicted of any of the offenses punished by this chapter shall be bound, and a lien is hereby created on the property, * * * so far as will be sufficient to pay the fine and costs of prosecution * * * which property so levied upon shall be advertised as in civil cases and sold for what it will bring. It shall be no objection to the selling of any property under such execution that the body is in custody for such fine and costs." Sec. 2009, Rev. Stat. 1908.

We are of the opinion that sec. 3628, Rev. Stat. 1908, exempting certain property from sale under execution, relates solely to civil actions; and that, under the provisions of sec. 2009, Rev. Stat. 1908, relating to executions in criminal cases, all the property of one convicted is liable to seizure thereunder. This conclusion seems to us correct for two reasons.

First. Both these sections have come down to us practically unchanged from the time of their first adoption in 1861. Section 3628 appears first as part of an Act concerning judgments and executions, Laws of 1861, p. 264; next as a part of chap. 48, Rev. Stat. 1868; next as a part of chap. 53, Gen. Laws of 1877; next as a part of chap. 60,

Gen. Stat. 1883; next as a part of chap. 76, Rev. Stat. 1908. The title of each of said chapters is "Judgments and Executions" and no part of any one of them, and no part of said Act of 1861 refers expressly to criminal law.

Section 2009 appears first as part of "An Act concerning Criminal Jurisprudence", Laws of 1861, p. 290; next as a part of chap. 22, Rev. Stat. 1868, entitled "Criminal Code"; next as a part of chap. 24, Gen. Laws 1877, entitled "Criminal Code"; next as a part of chap. 25, Gen. Stat. 1883, entitled "Criminal Code"; next as a part of chap. 35, Rev. Stat. 1908, entitled "Crimes"; and no part of any one of said chapters, and no part of said Act of 1861 refers expressly to civil actions.

Statutory provisions contained in Acts or chapters relating entirely to civil actions will not be construed to extend to criminal. *Parker v. People*, 7 Colo. App. 56, 42 Pac. 172; *Van Houton v. People*, 22 Colo. 53-55, 43 Pac. 137. "The provision relied on is found in the Civil Code, which relates alone to procedure in civil actions and by its title is confined to that kind of litigation. It can have no application in criminal cases." *Klink v. People*, 16 Colo. 467-469, 27 Pac. 1062.

In the case of *Saunders v. People*, 63 Colo. 241, 165 Pac. 781, the application of sec. 504, Gen. Stat. 1883, to a criminal case was in question. The plaintiff in error had been convicted in a criminal case in the County Court and judgment for costs entered against her. One of the items of costs was "jury fees, mileage and per diem, \$118.50." It appears that eighteen jurors had been summoned by order of court on open venire. Section 504, Gen. Stat. 1883 (which is sec. 1532, Rev. Stat. 1908), provides: "In any action pending before the County Court, either party may have a jury summoned to try the same, by advancing fees for the payment of such jurors, and when judgment shall be rendered in favor of the party demanding a trial by jury, such party shall recover the fees paid by him for such jurors, of the adverse party, and have the amount thereof taxed as a part of the costs in the case." This

question the court disposed of by saying, "That statute applies to civil and not to criminal cases." The section so construed is a part of chap. 22, Gen. Stat. 1883, entitled "County Courts." It contains no language in any of its sections specifically relating to criminal cases. It is sec. 580, chap. 23, Gen. Laws of 1877. The title of that chapter is also "County Courts". It was approved March 22, 1877. The title there in full is "An Act to repeal all existing laws in relation to the organization, jurisdiction, powers, proceedings and practice of the County Courts of the State of Colorado, and to enact other provisions in lieu thereof." It contains no language specifically relating to criminal cases. It expressly repeals chap. 71, Rev. Stat. 1868 "and all other laws or parts of laws, enacted since the first day of January A. D., 1869, by the Legislature of the late Territory of Colorado, relating to the organization, jurisdiction, powers, proceedings or practice of Probate Courts." (Said chap. 71 was entitled "An act concerning Probate Courts" approved November 7, 1861. There is no specific language in this section nor in the chapter of which it is a part, either in the Rev. Stat. 1908, Gen. Stat. 1883, Gen. Laws 1877, or Rev. Stat. 1868, expressly confining it to civil cases.

Second. The only justification for a different application of the foregoing rule would be a reasonably clear legislative intent. Such intent is not only absent in the case before us but the contrary appears. Section 2019, Rev. Stat. 1908, provides: "The Court shall have power, in all cases of conviction under this chapter, when any fine is inflicted, to order as a part of the judgment of the court, that the offender shall be committed to jail, there to remain until such fine and costs are fully paid, or otherwise legally discharged." It was the evident purpose of this statute to provide a method of compelling one to pay fine and costs adjudged against him in a criminal case, irrespective of *any* exemptions. All doubts as to such purpose are removed by section 2012, Rev. Stat. 1908, which provides: "Whenever it shall be made satisfactorily to appear to the

District Court of any district, or to any judge thereof in vacation, after all legal means have been exhausted, that any person who is confined in jail, * * * for any fine or costs * * * hath no estate whatever wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court or judge to discharge such person from further imprisonment for such fine and costs." It will be observed that one imprisoned to enforce the payment of fine and costs under section 2019, *supra*, is not to be released until, first, "all legal means have been exhausted" to collect the same; and second, until it is made satisfactorily to appear to the Judge that the person so imprisoned "hath no estate whatever wherewith to pay." Is it conceivable that the policy of the criminal law is first to grant to a convicted defendant the very liberal exemptions provided by section 3628, and then, under pressure of imprisonment, compel him to relinquish what the law has so generously exempted? We can not give the statutes in question such a construction.

No exemption having been provided in any Act relating expressly to criminal law, and a method having been provided in our criminal statutes to compel a defendant, by imprisonment, to subject *all* his property to the payment of a judgment for fine and costs levied against him, we are of the opinion that the exemptions contended for by plaintiff in error do not exist. The judgment is accordingly affirmed.

Garrigues, C. J. and Scott, J. dissent.

No. 9438.

OWENS v. GREENLEE, ET AL.

1. CONTRIBUTION—*Accommodation Endorsers*. Where one of several accommodation endorsers, pays the bill or note endorsed he is entitled to contribution.
2. *Collateral Security*, held by the party making the payment in no manner defeats his action for contribution.

3. *Measure of Liability.* Where one or more of those liable to contribution are insolvent, a ratable apportionment is made among the solvent joint debtors.
4. *BILLS AND NOTES—Endorsers—Notice of Dishonor.* In a suit in equity by one of several accommodation endorsers against the others, for contribution, the defendants will not be heard to contend that they were entitled to notice of the dishonor and protest of the bills.

The provisions of Rev. Stat., sec. 4552, have no application in such case.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. FREDERICK T. HENRY, Mr. CARLISLE FERGUSON and Mr. GEORGE O. MARRS, for plaintiff in error.

Mr. GEORGE P. STEELE, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFF brought this action in equity for contribution. At the close of his testimony an order of non-suit was entered. This order, and a judgment of dismissal entered in pursuance thereof, are now here for review.

It appears that plaintiff and defendants were joint accommodation endorsers of drafts aggregating \$10,000.00, drawn at various times during the year 1913, by The Colorado-Wyoming Power & Reclamation Company upon Westling, Enmet & Company, of Philadelphia. The amount thereof the plaintiff ultimately had to pay to The Colorado National Bank of Denver, in whose favor the drafts were drawn.

Plaintiff and his co-endorsers were stockholders in The Routt County Development Company. Greenlee, Heberton and Given were respectively President, Vice-President and Secretary thereof, and each had a salary as such officers. The Colorado-Wyoming Power & Reclamation Company was organized to take over the business of The Routt County Development Company, but owing to financial troubles the actual transfer never took place.

The first draft for \$10,000.00 was drawn April 1st, 1913, and was payable to the order of The Colorado National

Bank of Denver, July 1st, 1913. Prior to the delivery to the bank the draft was duly endorsed by the defendants and the plaintiff. There appears to have been no direct communication between plaintiff and Greenlee and Heberton in reference to the conditions under which the parties were to endorse, the defendant Given having acted as intermediary in all negotiations; each one consented, however, as the proofs show, to endorse only if the others did. Such was the agreement and understanding; that is common endorsement by all, and mutual liability.

It is shown conclusively that it was necessary to promptly raise money to save the company, and that the amount of the draft in question could be secured from The Colorado National Bank, if Owens endorsed. There is abundant testimony to establish that the defendants knew that Owens would not lend his signature to the paper unless the defendants also endorsed. Later it appears that Owens demanded additional security, and received a deed to certain land from the Reclamation Company for the purpose.

When this draft became due it was renewed by two others, each for \$5,000.00, endorsed as before. One of them was again renewed on September 1st, 1913, this renewal being endorsed only by Owens and the defendant Given. The other became due in October and was protested and notice given to Owens, Given and The Colorado National Bank.

The other renewal, which bore the endorsement of Owens and Given only, was likewise dishonored at maturity and protested, and notice given as before. Both drafts were thereafter paid by Owens with interest. The land deeded to Owens was foreclosed, and after deducting the amount expended in clearing off an incumbrance thereon, and in discharging other necessary expenses, the balance of the sale price was credited on account of the drafts. By this suit plaintiff seeks to recover ratable contribution for the balance of his outlay, after giving credit for the net amount realized from the sale of the land security.

It is not denied that defendants and plaintiff were joint accommodation endorsers of the paper in question, but the defendants contend that they were entitled to notice of dishonor and protest under sec. 4552, the Negotiable Instruments Act, R. S. 1908. There is no merit in this claim, because this action is not brought upon the drafts themselves, but is strictly a suit in equity, for reimbursement to plaintiff for his payment of a joint liability. If it were a suit between a third party, a holder for value in due course, and the endorsers, then a different rule would prevail, but as this is distinctively an equitable action, between co-endorsers only, to such action the provisions of the Negotiable Instruments Act, as to notice of dishonor and protest, has no application whatever, because no question concerning the negotiation of or liability upon commercial paper is involved. *Sloan v. Gibbs*, 56 S. C. 480, 35 S. E. 408, 76 Am. St. 559; *Mercantile Bank v. Busby*, 120 Tenn. 652, 113 S. W. 390; *Hunter v. Harris*, 63 Ore. 505, 127 Pac. 786. It is clearly manifest from his written opinion, brought up in the record, that the learned trial judge fell into the error of holding that the case is controlled by the provisions of the Negotiable Instruments Act, and that for lack of notice of dishonor and protest required thereby, and for that reason alone, he erroneously concluded that the defendants were not liable.

It is admitted that Owens paid the drafts and the testimony of the defendants themselves shows that they received substantial benefit from such endorsement. The parties as joint accommodation endorsers were alike liable, and since one of them has paid the debt he should, in equity and good conscience, have ratable contribution from his co-endorsers. The rule, as stated in 6 R. C. L., paragraph 2, page 1036, is as follows: "It is a familiar principle that, when several parties are equally liable for the same debt and one is compelled to pay the whole of it, he may have contribution against the others to obtain from them the payment of their respective shares. It is almost universally conceded that this doctrine is not founded on con-

tract but on an acknowledged principle of equity, which requires that those who voluntarily assume a common burden should bear it in equal proportions. And when any burden ought, from the relation of the parties or in respect of property held by them, to be equally borne, and each party is *in aequali jure*", contribution is due.

In *Hagerthy v. Phillips*, 83 Maine 336, 22 Atl. 223, it was sought to recover contribution for having paid a note upon which, with two others, the plaintiff was an endorser. The court, in holding that plaintiff had a right to contribution, said, at page 339: "Does the evidence justify the conclusion? Not a word was spoken by one endorser to another during negotiation. The facts were communicated through Mason. Each promised to sign if others would. If the act done was the act promised to be done, the order of signing was immaterial, because it was not a qualification of the promise. Each endorser made precisely the same promise. Each was as much entitled to sign last as the other. The first and second signers required assurance that the third would sign, a useless formality if their risk was not to be lessened thereby. They understood that the endorsers were to be holden alike, basing their conclusion on precisely the same facts that were presented to the defendant to induce him to sign. The request of Mason was that the defendant would endorse for him, not for others. The idea was to divide the risk among his friends. The defendant's promise was not to endorse last, but to endorse. He was not to do an act alone—the three were to do the act. The three did it, sharing obligation and risk alike."

In *Hunter v. Harris*, *supra*, the court, in holding that failure to give notice of dishonor to a co-surety will not defeat contribution as between co-sureties, said, in 127 Pac. at page 788: "According to the evidence in the record, Hunter and Harris, each, proposed that he would sign the note in question if the other would. Each accepted the other's proposition by signing the same. It is not material by what medium this proposal was conveyed from one to the other, whether by letter, wire, or through Mr. Hulse,

the accommodated party. As between these two parties to the note they were co-sureties. According to this construction of the evidence the defendant would be liable to plaintiff upon the theory of law conceded by counsel for defendant. In other words, we think there was a contract, understanding or agreement between plaintiff and defendant by which they were to be co-sureties on the note. Under these circumstances defendant, Harris, in so far as this plaintiff is concerned, was not entitled to notice of dishonor as an endorser under the provisions of section 5922 L. O. L. and was not released by want of such notice."

Discussing the nature of the suit, the court continues: "It should be borne in mind that this is an action between the parties to the note, for contribution as co-sureties. * * * Strictly speaking it is not based upon the note, which has run its course and been paid before suit. In the examination of this question it is worthy of note that a surety on a negotiable instrument is not mentioned in the Negotiable Instruments Law. This law provides that, in any case not provided for in the act, the rules of the law merchant shall govern."

It is admitted that all of the endorsements were placed upon the draft before it was negotiated, to make it acceptable to the bank, and from the evidence it is plain that this was done chiefly for the advantage of the defendants, and it is apparent that they in fact did receive substantial benefits from the transaction. The judgment rendered in this case must, therefore, be reversed under the settled rule that where several persons are liable for the same debt and one of them pays it, he has an action in equity for contribution against his co-debtors.

Nor is there any merit in the claim that because certain land was conveyed to plaintiff as partial security the parties were not placed upon an equal footing. Since the net proceeds from the sale of the land were credited upon the joint liability, it is clear that the defendants have and can have no ground of complaint on that score. The fact that a co-surety may have in his possession securities to

indemnify him against the default of his principal, in no sense prejudices his right to contribution. Daniels on Negotiable Instruments, Vol. 2 (6th Ed.), sec. 1341. Elliott on Contracts, sec. 3983; *Clayton v. Johnson*, 27 Ala. 503, 506. The situation of the parties is equal when they are under a common burden or liability, whether their respective liabilities are in the same or different amounts. 13 C. J., 822.

Upon principle and authority plaintiff has a plain right to the relief prayed. The whole purpose of the Law Merchant prior to the adoption of the uniform Negotiable Instruments Act was to make bills of exchange and checks, when put into circulation, to that extent take the place of money. The rules by statutes and decisions were so adopted for the protection of the purchaser for value in due course, and the makers and endorsers in relation to third persons. That Act simply endeavors to codify these rules, and to adopt what seemed to be the best and most uniform for given cases. Neither the Law Merchant nor the Negotiable Instruments Act attempted or attempts to prescribe or determine the rights of joint endorsers or joint makers as between themselves. These rights are left to be settled according to the principles of the common law and the equities between the parties. 2 R. C. L. 1123; 8 C. J. 291; *Sloan v. Gibbes*, *supra*; *Hunter v. Harris*, *supra*.

It is not questioned that Givens is insolvent and plaintiff prays judgment, by way of contribution, against each of the defendants Greenlee and Heberton for one-third of the amount which he has been compelled to pay. The measure of liability for contribution is a ratable apportionment among the solvent joint co-debtors. In *Sloan v. Gibbes*, *supra*, in speaking to this point, that court said: "The next matter we notice is the measure of the liability for contribution. The circuit court has found that the third endorser, Arthur, was dead, and insolvent, and this fact is not now questioned. In case any surety liable for contribution is insolvent the rule is that contribution must be in proportion to the number of solvent sureties. *Harris v.*

Ferguson, 2 Bailey 401; *McKenna v. George*, 2 Rich. Eq. 22, 1 Story's Eq., par. 496; 7 Enc. Law 341, 2nd Ed."

It appears from the record that the parties to this action have testified at length and the case is now, therefore, before the court upon a full record. No valid defense, either at law or in equity, has been plead or proved, and the right of plaintiff as a matter of fair dealing and common justice, to have contribution, is clearly manifest. The judgment below, therefore, is reversed and the cause remanded, with instructions to the trial court, in view of the undisputed insolvency of Given, to enter judgment for the plaintiff against each of the defendants Greenlee and Heberton, for one-third of the amount paid out by Owens in discharge of the joint debt, with continuing interest thereon from the date of such outlay, at the rate of eight per cent per annum, to the entry of the judgment hereby directed.

Judgment reversed and cause remanded, with instructions.

Mr. Chief Justice Garrigues and Mr. Justice Allen concur.

No. 9439.

PLAINS IRON WORKS COMPANY, ET AL. v. HAGGOTT.

1. EMBRYO CORPORATION—*Liability on Contracts of Those Promoting Its Organization.* An agreement among those proposing the organization of a corporation, as to commissions to be paid to parties who assist in the project is not binding upon such corporation, when organized, unless it expressly or impliedly assumes the liability.

The mere acceptance of property by the corporation paying therefor in full by the issue of its stock does not under the facts in this case warrant an inference of such assumption.

2. PARTIES—*Indispensable.* Corporate stock being held in trust for several beneficiaries the trustee was decreed to transfer to the plaintiff such number of the shares that the residue would not

suffice to supply all the beneficiaries, without determining which of the beneficiaries should bear the loss. Several of these beneficiaries were not parties to the suit. *Held* that the decree was erroneous unless the absentees were sufficiently represented.

3. JUDGMENT—*Inconsistent*. A judgment against several, the liability of one of whom exonerates the others, is error.
4. CONTRACT—*Consideration*. An agreement upon past consideration is *nudum pactum*.
5. EVIDENCE—*Parol*, may vary a receipt.
6. PLEADING—*Want of Consideration*, need not be pleaded.

*Error to Denver District Court, Hon. H. P. Burke, Judge.
En Banc.*

Mr. WILLIAM H. GABBERT and Mr. CHARLES C. BARKER, for plaintiffs in error.

Mr. E. M. SABIN and Mr. GREELEY W. WHITFORD, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

THE defendant in error brought suit below against the Plains Iron Works Company and others to recover \$10,000 in money and to enforce specific performance of an agreement to give him 250 shares of stock in said company, all as a "commission" or compensation for services. The suit was also upon two claims, assigned to him by one Hallman and one Gaiser, for 25 shares each of said stock, for services alleged to have been rendered by them. The decree required the defendant company to pay the \$10,000 with interest and required defendant Hubbell to transfer to plaintiff 299 shares of the stock on the three claims. The court found generally the truth of the complaint and made specific findings. Defendants bring error.

The defendant McConney had an option on the property of the F. M. Davis Iron Works, insolvent, in the hands of a receiver, and the complaint alleges that "it was agreed between the said McConney and the said Haggott, that

should the plaintiff undertake to interest parties with sufficient capital to organize a corporation with a capitalization of \$250,000 to take over the property of the said F. M. Davis Iron Works Company at the purchase price of \$85,000, that he, the said plaintiff, should receive as consideration therefor ten per cent of the capital stock of said corporation so organized, and \$10,000 in cash to be paid by the persons capitalizing said corporation, or the said persons so capitalizing said corporation were to cause said corporation to adopt and ratify said agreement, and if said agreement should be adopted and assumed by said corporation, then said persons were no longer to be personally liable therefor; and it was also agreed that the said McConney was likewise to receive the same compensation and the same amount of stock and to be paid in the same manner as the plaintiff." "It was also agreed that upon the payment of the purchase price of \$85,000 for the property of the said The F. M. Davis Iron Works Company by the persons to be procured to furnish the funds and to undertake the enterprise, all of said property should be transferred to said The Plains Iron Works Company, which was the corporation proposed to be organized for the purpose of taking over said The F. M. Davis Iron Works Company property, in consideration of the whole of its capital stock of two hundred and fifty thousand dollars being issued therefor, for distribution as should be agreed upon, ten per cent of which stock should then be given to said Haggott and ten per cent thereof to said McConney for the considerations aforesaid."

We do not decide the question whether the transactions upon which this action is founded were such that plaintiff is not here with clean hands.

We shall treat the complaint as if the words "undertake to interest" read "succeed in inducing."

It is this contract between McConney and Haggott, as set up in the complaint, on which the judgment (as to Haggott's services) against the Plains Company is based. It was not in writing. Haggott procured one Tully, since de-

ceased, and defendants Hubbell and Lowe to provide money to take over the Iron Works for \$85,000 and the payments were thus made according to the terms of the option. He relies on this as the performance of the consideration for the compensation or commission for which he sues. There is evidence that Hubbell, Tully and Lowe agreed that plaintiff should receive the \$10,000 and stock according to his contract with McConney.

The defendant corporation was formed, pursuant, as plaintiff claims, to this agreement, the option was assigned, and March 21st, 1916, the Iron Works property was conveyed to it, and one share each issued to the five directors. June 19, 1917, shares were issued, 249 to McConney, held by Hubbell as trustee, and the remaining shares to Hubbell as trustee for various parties.

The complaint alleges that the Plains Company adopted and assumed the McConney-Haggott contract, but defendant's counsel contend that no adoption or assumption of the contract by the Company is shown by the evidence, and that therefore the judgment against it is erroneous.

No express assumption by the Plains Company is shown, but the plaintiff relies upon the familiar principle that when a contract is made by promoters or others, to be performed by a corporation not yet formed, such corporation, when formed, is bound by such contract, if, with knowledge, it accepts the benefits thereof; and claims that the defendant company, knowing all the facts, accepted the option and property and is therefore bound to carry out the contract.

There is here no contract purporting to be a contract between McConney and Haggott on the one side and the unborn corporation on the other, as in some cases, *e. g.*, *Bommer v. Am. Spiral Co.*, 81 N. Y. 468. Nor is there evidence of any agreement between Haggott and Tully, Lowe and Hubbell that the company should do anything or become liable on the contract between them and him; there is alleged simply an agreement that they would give him \$10,000 and 250 shares of stock or cause the company to assume that obligation, in which case they should be exonerated.

The testimony is that it was agreed that Haggott "should receive" or it was "understood that he should have," etc. The sole reliance of plaintiff, then, for a judgment against the Plains Company must be on the implied assumption and that will not avail him.

If a corporation when formed accepts the benefits of a contract previously made in its name or for its benefit, under such circumstances as to make itself liable thereon, it becomes liable because the law implies the assumption of the burdens in consideration of the benefits. The principle is the same as that in the implied promise in assumpsit, the consideration having been accepted the promise is conclusively presumed, and need not be otherwise proved, because the conduct of defendant is inconsistent with any other supposition.

But what implication is there in the present case, in the acceptance by the company of the property or the option?

Tully, Lowe and Hubbell, by the terms of the contract, had their choice either to cause the company to assume the contract with Haggott, and so free themselves, or to continue to bear the liability themselves, in which case it is clear that the company was not to be liable. The acceptance by the company of the option and property was consistent with either alternative, assumption of liability by it or continuance of liability by the three promoters; therefore it gives rise to a presumption of neither.

Again: It seems impossible that the company should issue the ten per cent of the stock to Haggott under the terms of the arrangement set up in the complaint as quoted above, because it is provided there that all the stock should be issued for the purchase of the iron works and then be distributed to Haggott and the others.

The complaint alleges that the contract which is the basis of the suit provided that the stock should be issued by the company in payment for the property, and we must presume that this was done because no other consideration for its issue appears and because no consideration except its issue appears for the conveyance of the property to the

company, and because there is no evidence to the contrary. The stock was to be issued and subsequently distributed in accordance with the contract. It was so issued. If, therefore, there was such a contract, the company, on its part, has performed it according to its terms, so far as the stock is concerned, and so cannot be held liable thereon, and has no pecuniary interest in the decreed transfer of this stock from Hubbell to Haggott.

It follows from the foregoing that the specific finding of the court that there was an agreement between McConney and Haggott that the Plains Company should adopt the agreement for commissions was not in accordance with the pleadings and the finding that the assignment of the option to the Plains Company was "on the condition that the said company should pay the said Warren A. Haggott and the said R. B. McConney \$10,000 each" and issue them stock, and the finding that 299 shares were at all times "held in trust by said Plains Company for the use and benefit of said" Haggott, Gaiser and Hallman are without evidence to support them and are not in accordance with the contract set up in the complaint.

If, however, Tully, Lowe and Hubbell, in consideration of the transfer of the option, agreed with Haggott that his contract with McConney should be carried out and 250 shares distributed to Haggott after the issue of the stock in payment for the property, then the provisions in the decree that the stock be transferred from Hubbell to Haggott would be correct but for the fact that, by the terms of the complaint, he and Tully and Lowe are exonerated and that the decree is insufficient in this, that it does not disclose who of Hubbell's *cestuis qui trustent* should bear the loss. The amount of their several interests does not appear. There are several of them who are not parties to this suit. The suit must fail without them unless they are sufficiently represented by their trustees. That, however, seems doubtful.

The decree in form renders a judgment in general terms against all the defendants for the cash commission with

interest and then proceeds to direct the corporation, the Plains Company, to pay this sum. It follows from what has been said above that this decree is erroneous. Under the evidence the Plains Company does not owe Haggott anything, so the judgment against it for the cash commission cannot be sustained, and, under the allegations of the complaint, Tully, Lowe and Hubbell are exonerated, so the judgment against them (if it was so intended) for the cash commission is impossible. We are not sure whether it was intended to give this judgment against defendants Lowe and Hubbell and also the Plains Company. If so that was error, because the liability of that company exonerates the others. ✓

Haggott has given the heirs and estate of Tully a receipt in full. This receipt he said referred only to a certain transaction concerning stock therein mentioned, although in terms it is a receipt for all matters. Since the court found that the allegations of the fifth defense, in which accord and satisfaction and this receipt are set up, were not true, we suppose that the testimony of Mr. Haggott must have been taken as sufficient to vary the meaning of the receipt in his own handwriting. This might be done by the court, since a receipt has not the characteristic of a contract, which may not be varied by parol testimony. The same may be said of the accord and satisfaction with Hubbell, also stated in the fifth defense, the facts of which are similar except that there was no written receipt.

As to the claims of Hallman and Gaiser, assigned to Haggott, the evidence is that the agreement was made for services which they had rendered. The only evidence of any services performed by them is that they procured Tully and Lowe and sold or tried to sell stock in The Hydro-Carbon Products Company, called the Carbon Company. Upon the employment of Haggott by McConney to get somebody to capitalize the proposed corporation, he, Haggott, employed Hallman and Gaiser to help him and they procured Tully and Lowe and Tully and Lowe afterwards procured Hubbell. If we assume that Tully, Lowe and Hubbell

agreed to give Hallman and Gaiser \$5,000 shares for this, we view the strange anomaly of an agreement by them to pay a broker for previously procuring themselves to furnish money to capitalize a corporation. This agreement was *nudum pactum*, because the consideration was past; and could not have been, in the nature of things, and was not, under the evidence, performed with any understanding on the part of Tully, Lowe and Hubbell that it was to be paid for by them. (9 Cyc. 358). The only other services that Hallman and Gaiser rendered were to sell and attempt to sell certain stock of the Carbon Company; and this was either for the purpose of raising money with which to buy sixty per cent of the Plains Company stock for \$150,000, which, under the circumstances, would be a fraud on the Carbon Company, or else it had no connection whatever with the Plains Company or with the transaction in question in this suit, being upon an employment entered into before the purchase of the iron works was proposed, for a consideration then agreed on, to be paid by the Carbon Company or its promoters. In neither of these alternatives can the work of Hallman and Gaiser in selling the Carbon stock be made the basis of any claim against the Plains Company, nor against Tully, Lowe or Hubbell.

(Want of consideration is not pleaded, but need not be. *Alden v. Carpenter*, 7 Colo. 87, 92.)

The judgment should be reversed with leave to amend or re-plead and a new trial granted.

Allen, J. and Scott, J. dissent.

Judgment Reversed.

On Motion for Rehearing.

En Banc.

Denison, J.

We adhere to our former opinion though not to all the inferences that seem to have been drawn from it: It should be understood that we do not determine whether his *cestuis qui trustent* can be represented by Hubbell, and, if

not, we are unable to see how their rights can be saved unless the debt of stock due Haggott, if any, can be satisfied out of what, if any, Hubbell may be shown to hold for himself or Lowe, the beneficiaries who owe it, if any of them do.

No. 9495.

STERNBERGER, ET AL. v. CONTINENTAL MINES POWER &
REDUCTION COMPANY.

1. *STATUTORY PROCEEDING—Sufficiency of Statute.* It is sufficient for any proceeding that it is authorized under any statute relevant thereto.
2. *EMINENT DOMAIN—Order for Possession,* in the first instance, even if in violation of the constitution, does not vitiate the subsequent proceedings, if regular, unless it appears that such order injuriously affected the rights of respondents.
3. *Practice and Error—Record.* The questions as to which there is no evidence in the record will not be considered.
4. —*Brief.* Counsel commended for the brevity and lucidity of the brief.

*Error to Clear Creek District Court, Hon. H. S. Class,
Judge.*

En Banc.

Messrs. TOLLES & COBBEY, for plaintiffs in error.

Messrs. MORRISON & DE SOTO, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

THE defendant in error brought its petition below, under the eminent domain acts, to condemn a right of way across land of plaintiffs in error, respondents below, to erect poles, wires, etc., for an electric power line. There is some dispute as to whether the petitioner proceeded under S. L. 1907, ch. 125 (p. 282) approved Apr. 9, or ch. 175 (p. 385), approved Apr. 2, but as we view the case it is immaterial

which. It is sufficient for any proceeding if it be lawful under any of the laws relevant thereto.

The court entered an order, before service of summons and without notice to respondents, permitting petitioner to take possession of the right of way. This is assigned as error on the ground that the order itself and the statutes permitting it (if they do permit it) (S. L. 1907, p. 386, § 6 and R. S. 1908, § 2420) are in violation of the constitutional requirement of due process of law, because they do not require notice and respondents had no notice, and of the prohibition of the taking of property for public use without just compensation, because possession was taken before compensation was paid or ascertained.

Whether such an interlocutory order violates the constitutional provisions or not, it does not vitiate the rest of the proceedings for condemnation; and if in those proceedings, respondents have, as in this case, had notice and have had their compensation judicially ascertained, the case will not be reversed because of such order, unless it be shown that it has injuriously affected their rights upon the merits. *Colo. F. & I. Co. v. Four M. Ry. Co.*, 29 Colo. 90, 66 Pac. 962; *Lavelle v. Julesburg*, 49 Colo. 290, 112 Pac. 774; See also *McClain v. People of Colo.*, 9 Colo. 191, and *San Luis Co. v. Canal Co.*, 3 Colo. App. 244, 32 Pac. 860.

No such injury is shown here. On the contrary, the respondents appeared and contested the case, the deposit of \$150, required by the court on granting possession, was, on their motion, enlarged to \$650, and commissioners, after much evidence on both sides, duly fixed the damage at \$301.20.

The question is raised as to the right of the petitioner to exercise the power of eminent domain. That question was tried and determined for the petitioner; the evidence upon that point, however, is not in the record and nothing in the record shows this decision to be erroneous, so we must let it stand. The same is true as to the question of the amount of compensation.

We wish to commend counsel for defendant in error for the brevity and clearness of their brief.

The judgment should be affirmed.

Decided Jan. 5, 1920. Rehearing denied Feb. 2, A. D. 1920.

No. 9504.

PUEBLO FOUNDRY & MACHINE COMPANY v. LANNON, ET AL.

1. **CONTRACTS—Validity.** Frank and John Lannon owned the stock of the defendant. Burris desiring to become interested in the enterprise, it was agreed that the property of the company should be valued at \$100,000. Burris was unwilling or unable to pay for one-half of the stock, at this valuation, and it was agreed to issue \$40,000 in bonds, so as to reduce the value of the shares to \$60,000, and the arrangement was concluded accordingly, the bonds being issued one-half to the Lannons and one-half to Burris. Only \$8,000 in all, was paid for the bonds, \$4,000 by the Lannons and \$4,000 by Burris. All this was agreed to and approved by meetings of the stockholders and Board of Directors,—the two bodies being composed of the same persons. The bonds were secured by mortgage of the company's property. On bill to foreclose this mortgage it was contended by the corporation that the bonds were void for want of consideration under sec. 9, article XV of the Constitution. *Held* that in effect the bonds were sold at approximately par value; that the distribution of the bonds among the directors was justified by the unanimous consent of the stockholders, and that the stockholders having acquiesced and participated in the transaction, were bound by it, as were those who succeeded to their interest.
2. **CORPORATIONS—Relation to Members.** Where the stockholders have no equitable right they cannot assert any such supposed right, or obtain relief in respect thereto by acting through the corporate entity.
3. —**Power to Dispose of Assets.** A solvent corporation may dispose of its assets as the stockholders see fit, so long as present creditors are not injured.
4. **FRAUDULENT CONVEYANCES—Future Creditors,** cannot complain.

Error to Pueblo District Court, Hon. J. E. Rizer, Judge.

Messrs. ADAMS & GAST and Messrs. DEVINE & PRESTON, for plaintiff in error.

Mr. N. WALTER DIXON, Mr. M. G. SAUNDERS, Mr. E. F. CHAMBERS and Mr. J. T. MCCORKLE, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS was an action by defendants in error against The Pueblo Foundry Company to foreclose a mortgage, or deed of trust on its property, securing the payment of an issue of forty thousand dollars of first mortgage bonds of that company. Defendant in error John M. Lannon, as a holder of certain of these bonds, intervened, and joined in the prayer for foreclosure. The validity of the bonds was denied by the company, it being urged that they were issued without consideration, and therefore in contravention of a provision of our State Constitution. Findings and decree were for defendants in error, and the company brings the case here for review.

The resolution authorizing the issue of the bonds in question was passed on April 1, 1907. At that time the stockholders of the company consisted of the Lannons, who owned all of the shares of the company, which were of the par value of one dollar a share. Shortly prior to the issue of the bonds it was determined by the Lannons to make a change in the affairs of the company, and John M. Lannon, who it appears had never been active in the corporation, agreed to sell his shares therein to one S. J. Burris. As a basis for negotiations it was agreed by the parties that the valuation of the property should be fixed at \$100,000.00. The Lannons were to withdraw all the company cash, pay all bills against and collect all accounts due it, with a view of reducing the actual value of the shares of the concern to the figure agreed upon. Burris, who desired to purchase one-half interest in the company, was unable to raise the \$50,000.00 necessary, and to

enable him to purchase such interest it was determined to further reduce the value of the shares by issuing \$40,000.00 in bonds secured by deed of trust on the company property, and to so bring the real value of the total shares of the company to \$60,000.00. This was accordingly done. John Lannon agreed to sell his interest for \$10,000.00 in cash, and thirteen of the proposed bonds, and Frank Lannon took an option upon John's holdings in the company on that basis.

At the stockholders' meeting of April 1, 1907, the entire capital stock of the company was owned by Frank and Charles Lannon. The stock of John, not having been yet transferred, was represented by proxy. John resigned as a director of the company, and Burris was selected to take his place. At the directors' meeting, the issue of the bonds, which had been authorized by the stockholders, was directed to be made. The stock was then owned in equal parts, Frank and Charles Lannon the one-half, and Burris the other. The bonds were issued, ten each to Charles and Frank Lannon, and twenty to Burris. The two Lannon brothers each paid in \$2,000.00 to the company, and Burris \$4,000.00. Pending the printing and execution of the bonds, the stock owned by John Lannon was held in escrow, and Charles and Frank Lannon transferred to Burris his shares from their own holdings, and it was through Frank Lannon that Burris paid into the company the four thousand dollars for his twenty bonds. It appears that all the books of the corporation except the journal which contained the history of these transactions, were obtainable, but that the defendant corporation could not, or at least failed to produce, this particular record, although it had been in the possession of the company at all times subsequent to the transfer of the stock, and of the reorganization of the board of directors. The testimony, however, shows beyond any possible doubt that the transaction between the parties was in substance and effect as stated above.

Following the transfer of the stock as set forth, certain other persons obtained shares in the corporation, and the Lannons ceased to have any interest in the company, other than as holders of certain of the bonds in question. The present stockholders, who must be conclusively presumed to have had actual knowledge of the existence of the bonds and of all the circumstances under which they were issued, are now attempting to avoid their payment. Seven of the bonds are conceded by the company to be valid obligations. This is upon the theory that they are in the hands of innocent purchasers, although it appears that two at least of these bonds, were sold by Burris to persons with full knowledge of all the circumstances now relied upon to avoid the entire issue.

It is urged by the company that the bonds are void for lack of consideration under section 9, Article XV of the Constitution. This point is not well taken, because it is clear that \$8,000.00 at least was paid in cash to the company for the bonds. The fact that this amount was paid by the Lannons does not make it any the less a payment to the company. The payment was so made because of the agreement for purchase and sale of the stock between the Lannons and Burris, and the method adopted was an entirely proper and logical way of arriving at an adjustment between the parties. Also, when the transaction is considered as a whole, it is plain that the bonds were issued for the express and agreed purpose of permitting Burris to come into the company on an equal footing with the two Lannons; that to do this it was necessary to lessen the value of the shares of the company, and the bond issue had precisely that effect, as the value so withdrawn from the shares immediately attached to the bonds. Under these circumstances it may well be held that the bonds were sold at approximately par value, in so far as the corporation itself is concerned, and it follows inevitably that the claim that the bonds were issued without consideration has no support at all in fact.

It is also contended that the board of directors, acting apart from, and without regard for the corporation or the interests of the stockholders, procured the issuance of the bonds and distributed them among themselves. While it may be conceded that the bonds were all distributed to the directors, it is likewise true that the directors were all of the stockholders; in other words, all of the stockholders were directors, and every share of the stock of the corporation was represented at the stockholders meeting at which their issuance was authorized, and also at the directors meeting at which instructions were given to issue the bonds as authorized. The bonds were issued for the purpose of carrying out the change of ownership of the stock as heretofore detailed. It is elementary that by the unanimous consent of all stockholders a solvent corporation may make any disposition of the company assets they desire, in the absence of fraud upon creditors. Cook on Corporations, 6th Ed., sec. 730; *Great Western M. & M. Co. v. Harris*, 128 Fed. 321, 63 C. C. A. 51. A corporation has no such separate entity as will permit it to act counter to the unanimous desire of its stockholders. Cook on Corporations, 6th Ed., sec. 730, and note, p. 2387.

This is not a case where the board of directors have dealt with the corporation or with others for their individual profit. It is not a fact that the shares which Burris sought to purchase were property of the company; they were the shares of the Lannons; and the bond issue reduced, ratably, the value of the shares of stock retained by them as well as of those sold to Burris. The loss, if any, was not sustained by the corporation, but by the holders of the shares. By participation in the transaction the shareholders are estopped to deny its legality, and the corporate entity cannot act for them, *Home Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. 716.

The entire body of stockholders acquiesced and participated in the transaction. They are accordingly bound by it, and their transferees are also bound. In *Gumaer v.*

Cripple Creek Tunnel Transportation & Mining Co., 40 Colo. 1, 90 Pac. 81, 22 Ann. Cas. 781, this court in speaking to this question said, at page 17: "Not only the participating and acquiescing stockholders, but also their transferees, are bound by the participation or acquiescence. The transferee cannot claim to have greater rights than his transferor as regards a generally remedy invalidating the whole transaction. He cannot bring suit in behalf of the corporation and other stockholders against the party or parties participating in the issue, inasmuch as his own title is tainted with the same fraud. Nor can he bring an action against the corporation."

The attempt by the company to avoid foreclosure of the bonds is an attempt to do that which the stockholders cannot do. It is clear that the stockholders have no equitable right to the relief sought, therefore they cannot obtain such relief acting by or through the corporate entity. *Home Ins. Co. v. Barber*, *supra*; *Arkansas R. L. T. & C. Co. v. Farmers Co.*, 13 Colo. 587, 22 Pac. 594; *Des Moines Gas Co. v. West*, 50 Iowa 16.

It is to be noted that the present stockholders secured their shares subject to the lien of the bonds, and therefore at a lower figure than would have been possible without such incumbrance. They should not now be permitted to repudiate the indebtedness and so add the value of the bond issue to their shares of stock in the company.

It is undoubted that a solvent corporation may not only dispose of its assets as the stockholders see fit, but it may dispose of its bonds at less than par, provided, of course, no creditor be thereby defrauded. So long as present creditors are not injured, future creditors cannot complain. *Hamilton v. Menominee Co.*, 106 Wis. 352, 81 N. W. 876; *Little v. Garabrant*, 153 N. Y. 661, 90 Hun. 404, 35 N. Y. Sup. 689; *Pusey v. N. J. Co.*, 14 Abb. Pr. (N. S.) 434. Also such corporations, with the unanimous consent of its stockholders, provided no third parties are injured, may issue its bonds for the benefit of individual stockholders. *Cook on Corporations*, sec. 766; *D'Ooge v. Leeds*, 176 Mass. 558,

57 N. E. 1025. So far as the facts and the parties are concerned, it is the same as if the present complaining stockholders took their stock in exchange for the bonds in question, and then sought to repudiate the bonds.

It is apparent that the issue of the bonds in question does not fall within the inhibitions of sec. 9, Article XV of the constitution, because those bonds were manifestly issued for a good and valuable consideration paid to the corporation, and in no sense constitutes a fictitious increase of company indebtedness.

We have examined the entire record with the most painstaking care, and fail to discover a syllable of evidence, or anything else contained therein, which shows or tends to show that there is anything in the transaction which is in the slightest tainted, or which did cause or could cause a loss to the company, or which worked or could work it, or any one else, a wrong or injury. The whole matter seems to have been absolutely free from any indirection, fraud, deceit or wrong doing of which complaint either by the company, or by any original or subsequent stockholder, could or can justly or properly be made or upheld.

The judgment is affirmed.

Decision *en banc*.

No. 9458.

OHIO & COLORADO SMELTING & REFINING COMPANY v.
PUBLIC UTILITIES COMMISSION, ET AL.

1. CONSTITUTIONAL LAW—*Obligation of Contracts*. It is the overwhelming weight of judicial opinion that constitutional provisions against laws impairing the obligation of contracts do not prevent the state from the proper exercise of the power vested in it for the promotion of the common weal and the general good.

Private contracts must yield to the public welfare where the latter is appropriately declared and defined.

2. PUBLIC UTILITIES COMMISSION—*Powers*. The Utilities Commission was held authorized to grant to a corporation furnishing electric power, an increase in the rate of charge fixed by a prior contract.

But the commission having by no competent testimony attempted to establish the value of the Utility Company's property, its order was set aside.

The power of the commission to determine that the rate of compensation fixed by a contract is insufficient, is a very grave and dangerous power, to be asserted with the greatest caution.

The capitalization of a concern has but little relation to its value, as affording a basis of rates.

3. —*Rehearings*. A witness eminently qualified to speak as to the value of the plant of a utility company which has been authorized to increase its rates, was absent at the original hearing, but accessible when a motion for a rehearing came on. *Held* it was the clear duty of the Utilities Commission to reopen the case.

4. PUBLIC SERVICE CORPORATIONS—*Just Compensation for Service*. A Utility Corporation is entitled to a fair return upon the reasonable value of its property at the time it is being used for the public.

5. —*Extensions and Improvements*, are not to be made, without the approval of the Utilities Commission. If such improvements are found unprofitable the company must be loser. It will not be permitted to charge the loss to the public.

6. SMELTING COMPANY—*Affected With a Public Interest*. A smelting company treating ores from various parts of the state, is affected with a public interest.

Review to the Public Utilities Commission.

MESSRS. YEAMAN & GOVE, for plaintiff in error.

Mr. WILLIAM V. HODGES, Mr. D. EDGAR WILSON, and Mr. ELSON H. WHITNEY, for the Colorado Power Company.

Mr. Justice Scott delivered the opinion of the court.

THE Salida Light, Power and Utility Company, a corporation organized under the laws of the State of Colorado, on

the 10th day of October, 1907, entered into a written contract with the Ohio and Colorado Smelting and Refining Company, a corporation, by which the Power company agreed to supply, and the Smelting company agreed to purchase from the Power company electrical energy sufficient to operate its smelter, located near Salida, Colorado. The price to be paid under the contract was \$50.00 per horse power per annum, which it is agreed is equivalent to 7.65 mills per kilowatt hour. This contract was continued or extended by written agreement between the parties to October 10, 1923, the last extension bearing date of January 21, 1913. The contract involved extensive improvements by both parties which were afterwards made. Power has been continuously supplied to the Smelting company under the agreement until the present proceeding.

In February, 1915, the plant, properties, contracts, etc., of the Salida Light, Power and Utility Company were conveyed and assigned to the Colorado Power Company, which has since continued to operate the same. On April 13, 1918, The Colorado Power Company filed a petition with the Public Utilities Commission of the State, praying for an order increasing the rates above those provided in the contract, to one cent per kilowatt hour. To support this petition, it was alleged: "(a) Increase in operating expenses; (b) The fair value of the Salida plant is \$500,000.00. A fair net return would be \$40,000.00 per annum. The present net return is \$32,224.00. The company is therefore entitled to an increase in its net return of \$8,000.00. (d) The Smelting company requires approximately 60 per cent of the output of the Power company, and the inability of the Power company to derive a reasonable return is principally due to the rate named in the agreement for service to the Smelting company."

By motion to dismiss and by answer, the Smelting company contended in substance as follows: That the action demanded of the Public Utilities Commission was in violation of those certain provisions of the Federal and State constitutions, which guarantee due process of law, the

inviolability of contracts, and which deny the enactment of laws having retroactive effect; (b) denial of the allegation in the Power company's petition that \$32,224.00, the alleged net revenue for the company for the year 1917, is not an adequate return upon the fair value of petitioner's property, and other specific denials, including the allegations of necessary increased use of steam power, necessary increase of operating expenses, averments as to average rates and distribution of current generated; denial that increase in revenue is necessary; and general denial of averments in petition not specifically denied. It was further alleged in substance: "The erection of an electric power plant by the Smelter company for its own use. Efforts of the Salida Light, Power and Utility Company to have Smelting Company abandon its own plant and take its power from the former company. The execution of the contract of October 10, 1907. The extension of that contract on January 9, 1913, at instance of Salida Light, Power and Utility Company. The transfer of all of the capital stock of the Salida Light, Power and Utility Company to the Colorado Power Company about Jan. 9, 1913. The transfer of all the assets of the Salida Light, Power and Utility Company to the Colorado Power Company Feb. 10, 1915. That the Smelting Company, as required by said contract, made certain changes, alterations and additions in its smelting plant and electrical system in compliance with provisions of the contract. At date of contract power was generated by petitioner almost wholly by water power. Its capacity was largely in excess of demands. The Smelting Company was the only concern of that character supplied by petitioner, and the Power Company plant was sufficient to supply all requirements of the district. That subsequent to Jan. 9, 1913, petitioner entered into other contracts with other consumers, which necessitated additional electric steam power equipment. The issuance by petitioner of \$4,000,000.00 of first mortgage 5 per cent bonds, \$750,000.00 of 7 per cent preferred stock and \$11,000,000.00 of common stock. Payment by

petitioner of interest on its bonds, dividends upon its preferred and common stock, the setting aside for depreciation reserve of \$99,000.00 in 1916, and \$115,000.00 in 1917, and the accumulation of a surplus of \$29,000.00 for 1916 and more than \$91,000.00 for 1917. That the net earnings of petitioner for 1917 were more than 18 per cent in excess of net earnings for 1916, and the net income for 1917 was 25 per cent in excess of the net income for 1916. The total income of petitioner for 1917 exceeded \$700,000.00 and the net income after all deductions exceeded \$357,000.00. That petitioner on June 1, 1913, entered into a contract with the American Smelting and Refining Company and thereby agreed to furnish electrical current to that company for its smelter in Leadville upon practically the same terms specified in the contract of October 10, 1907, with the Ohio Smelting Company. That any order of the commission increasing the Smelting Company's rates would require it to pay a greater charge than the American Smelting and Refining Company and would be unjust, unreasonable, discriminatory and preferential. That the Smelting Company's plant was erected at a cost many times exceeding the cost of petitioner's Salida plant. The Smelting Company's plant has been operated at a loss, but has been largely beneficial to the city of Salida. An increase in the rate of the Smelting Company would result in additional loss to that company and increase the income of the Power Company."

The commission, upon hearing, ordered that the rate of 7.65 mills per kilowatt hour fixed in the contract be cancelled, and fixed the flat rate of 9.5 mills per kilowatt hour to be charged to the Smelting Company. We are asked to review that order.

Counsel for the Smelting Company has very elaborately and ably argued its contention that the decision of the commission was in violation of the several constitutional provisions suggested, and that the obligation of the contract between the parties was impaired, and that the plaintiff in error was deprived of its property without due pro-

cess of law; that the statute was retroactive, and that therefore the commission was without power to change or alter the terms of the contract.

We think without further discussion that it is the overwhelming weight of judicial opinion in this country, that the constitutional interdiction of statutes impairing the obligations of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal, or as are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. We have heretofore decided this question as to contracts entered into by municipalities in relation to rates to be charged by public utilities, as affected by the after asserted power of the State. *Denver & South Platte Ry. Co. v. City of Englewood*, 62 Colo. 229. But a careful review of the authorities leads us to the conclusion that this rule as to the after asserted exercise of the police power applies equally in the case of contracts relating to a public service as between persons and corporations. The rule requires no further citation than that of the latest decided case of the United States Supreme Court, called to our attention, where the doctrine seems to be announced as the final word upon that subject by that Court. A further examination of the decisions of the appellate courts from the several states discloses the great weight of authority to be in agreement with the view of the Federal Supreme Court.

In the case of *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, speaking through Mr. Justice Clarke, it was said: "The Georgia Public Service Corporation and The Union Dry Goods Company, both corporations organized under Georgia law and doing business in Macon, on July 18, 1912, contracted together in writing for the term of five years, the former to supply electric light and power to the latter, which agreed to pay stipulated rates for the service.

The contract was performed for almost two years, until in April, 1914, when the Dry Goods Company refused to

pay a bill for service rendered during March, in which a rate higher than that of the contract was charged. The Service Corporation claimed that this rate was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

Soon thereafter the Dry Goods Company commenced this suit to compel specific performance of its contract, which had three years yet to run; to enjoin the Service Corporation from charging the higher rate, and from executing a threat to cut it off from a supply of electricity, because of failure to pay the increased rate.

The trial court and the Supreme Court of Georgia both held against the claims of the Dry Goods Company and the case is here for review on writ of error. * * *

Of the several claims pressed in argument, we need notice only two: That the obligation of the contract of July 18, 1912, was impaired, and that the plaintiff in error was deprived of its property without due process of law, by the decision of the Supreme Court of Georgia, holding that the rates prescribed by the Railroad Commission were valid and superseded those of the contract between the parties.

* * *

Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in *Manigault v. Springs*, 199 U. S. 473, 480, it was declared that:

'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.'

This on authority of many cases which are cited.

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357, it is said that:

‘One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject-matter.’

In *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482, this is quoted with approval from *Knox v. Lee*, 12 Wall. 457, 550, 551, viz:

‘Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to defeat the legitimate government authority.’

In the same report, In *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, at p. 567, it is said:

‘There is no absolute freedom to do as one wills or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.’

In *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558, the court said:

‘It is settled that neither the “contract” clause nor the “due process” clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.’

And in *Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349, the state of the law upon the subject is thus aptly described:

‘This court has so often affirmed the right of the State

in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing.'

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State, and the judgment of the Supreme Court of Georgia must be affirmed."

It is urged that when the contract in this case was made and at the time of the extensions, the Public Utilities statute was not in effect and that both companies were private corporations with full power to make the contract they did, and for such reason the rule cannot apply. This contention cannot be sustained. In the case cited, quoting from the case of *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, it was said: "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to defeat the legitimate government authority." So we must hold in this case that the power of the commission to act in the premises must be sustained.

Conceding then, the jurisdiction of the Public Utilities Commission, it remains to determine the question of the validity and justice of the order entered. The record discloses that the Colorado Power Company is a public utility corporation, seemingly operating in Colorado alone, and that it generates its electrical energy by means of water and steam power. It is a large concern, and its operations cover a large part of the State, particularly the western and southern portions. Its capital stock consists of \$750,000 preferred, to the extent of a seven per cent. annual dividend, and \$11,000,000 common stock. It has a bonded indebtedness of \$4,000,000, bearing interest at five per cent. per annum. The record discloses that the corporation has for some years paid the dividend on its preferred stock, and has met the interest on its bonds, and for the two

years prior to the hearing, paid a dividend on its large issue of common stock, of two per cent. In addition to this, it set aside \$99,000 in 1916, and \$115,000 in 1917, for depreciation, and showed the accumulation of a surplus of \$29,000 in 1916, and \$91,000 in 1917, the latter being the year preceding the hearing. This computation includes the operation of that part of the property of the company referred to in this case as the Salida plant.

It is very clear that the Colorado Power Company, complainant, operates all its properties as one concern; that its receipts and disbursements are from the one treasury. But the commission, for some unexplained reason considered the Salida plant alone in the establishment of the rate.

In discussing the findings and conclusions of the commission, we will treat of these separately. The unquestioned rule of law is that what the utility company is entitled to demand in the matter of rates, in order that it may have just compensation, is a fair return upon the reasonable value of its property at the time it is being used for the public. POND on Public Utilities, Sec. 476. To ascertain such reasonable value for the purpose of fixing rates and in addition to its net earnings, it is the rule of law that there are four different theories for the determination of what constitutes a reasonable value under the facts of any particular case. "These theories are generally defined by terms which indicate the method of ascertaining what would be a fair return on the reasonable value of the property, and are thus expressed—original cost; cost of reproduction; outstanding capitalization, and present value. Since the authorities are not agreed as to the proper theory for determining rates nor as to the manner of applying the legal principle established for that purpose, it is impossible that they should agree on what constitutes a reasonable rate in any case or that a decision in any state should control in other states, although the facts of the case may be similar or even identical because the courts are not agreed as to the proper theory to be applied for the solution

of the question." Pond, Public Utilities, Sec. 477. The adoption of any one of these four theories in a given case is attended with great difficulty and in some cases impossible for any one of them to prevail and justice be done. But so many decisions have been rendered in relation to the proper method of ascertainment of the reasonable value of the property, that commissions of this character may be presumed to be fairly enlightened when considering the particular case as to whether any one or more of these theories may be justly adopted and for such reason, so that in this case a further discussion of this subject is not important.

But it is a necessary prerequisite that a reasonable value of the property at the time it is being used be established. It is then necessary in all cases that this value be considered as a basis for the fixing of rates. These rules were both violated by the commission in the case under consideration. For by no competent testimony did the commission attempt to establish a reasonable value of the property of the Power Company, either as a whole or of the Salida plant as a part thereof. The commission cannot be lawfully excused for this failure upon its part. It is not a court to consider and determine only that which is brought before it. It is a legislative agent, with certain administrative duties. One of its duties is to investigate and determine in the interest of the State. For this purpose the State has provided it with the proper engineers and other expert assistants to ascertain whatever facts may be necessary or important to justify a conclusion in any case, and this independent of, or in addition to, any testimony produced by the parties directly interested. Indeed, the statute expressly provides that the commission may investigate and determine as to any rate, rule or regulation, upon its own initiative.

The sole reason for holding that the power rests with the commission to increase or decrease a rate stipulated in a contract, and that the exercise of such a power is not an infringement of the constitutional inhibitions against the

impairment of a contract obligation, and likewise the guarantee of due process of law, is that the public welfare demands it in the specific case. Therefore the commission, with the delegated legislative power of the State, must determine that the rate fixed in the contract is detrimental to the public weal. This is the exercise of a very grave and dangerous power and should be asserted with the greatest caution, and by means of every instrumentality at the command of the commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare. It is not as if the commission were to establish a rate in the first instance, as based upon its own judgment as to reasonableness, but it must first determine that a contract in this respect, between persons engaged in the particular business and presumably well advised as to its probable effect, not only at the time, but in the light of future conditions, is so unreasonable as to be detrimental to the public interest.

As to the entire business of the Power Company, the evidence, if what was before the commission may be dignified by that term, is as above stated. It would seem that the dividends paid, the interest on the bonds, the amounts set aside for depreciation and surplus, aggregating \$357,000, may be presumed in the natural order of things to be reasonable, when we consider its acceptance for so many years. This, at an interest rate of seven per cent. annually, the preferred stock rate, and therefore the agreed rate in that case, would sustain a valuation of \$5,100,000. There is no testimony in this case from which the commission could conclude that the present value of the plant equalled any such sum, and it did not attempt to so determine.

The issue by that company of the enormous amount of eleven millions of dollars par value of common stock, and upon which it is paying a two per cent. annual dividend, was sufficient to put the commission upon inquiry as to whether this represented the actual value, or whether it was in fact what is commonly termed "watered stock." This

fact and other circumstances in the case made it plain that it was the duty of the commission to ascertain the reasonable present value of the plant, and also to investigate the arbitrary amounts set aside for depreciation and surplus.

That the outstanding capitalization can have but little, if any, relation to the value, as affecting the basis for rates, is the accepted rule of the courts. Mr. Pond states the rule to be: "The theory of outstanding capitalization is not satisfactory because experience has shown that in many cases it has very little, if any, relation to the actual value of the investment. Fortunately for the consumer, the courts are practically agreed that the outstanding capitalization or the amount of stock and bonds issued is neither a fair test of the capital actually invested in the business nor a reliable measure by which to estimate the reasonable value of the property used and useful in rendering the service; and many cases have expressly stated that there is little, if any, logical connection between the actual value of the investment and the par or even market value of the stock and bonds issued by the company, which the courts have said only constitutes evidence of the history of the development of the business and are valuable chiefly for that purpose." Pond, Public Utilities, sec. 480. The failure to observe this rule in the ascertainment of the value of the Salida plant, upon which the commission elected to base its order, is as flagrant if not more so, than in the case of the entire property of the Power Company.

The commission very properly declined to fix the reasonable value of the Salida plant for rate making, as being that of \$500,000, which was testified to by the witness for the Power Company, as the book value, and represented the purchase price. Neither did it fix any other specific value. The commission said: "Any adjustment in the rate now being paid by the Smelting Company must therefore be made on a finding that such rate is preferential and discriminatory as regards other consumers." It will thus be seen that the commission wholly abandoned the allegations of the complaint to the effect that the Power Com-

pany's rate to the Smelter Company should be increased because of increased cost of operation, and insufficient return on its invested capital in its Salida plant, and determined the matter solely upon a theory that is not involved in the pleadings, viz., that the contract rate with the Smelter Company "is preferential and discriminatory as regards other consumers." This question was not only not involved in the pleadings, but wholly without sufficient proof to sustain a finding that there was discrimination in favor of the Salida smelter alone. It is palpable that if there is such discrimination as affects the public welfare, it applies equally at least in the case of the Leadville smelter, which the commission used only in comparison. And here is where the commission unnecessarily got into deep water, by abandoning the universal rule of the courts to the effect that the basis must be the reasonable value of the property at the time.

It was clearly within its own power by the use of its skilled assistants, to reasonably ascertain this value. Not only this, but it also appears from the record that there was a witness, a Mr. Disman, who as president and principal owner of the Salida plant, constructed the same, and could testify as to the original cost of the plant, but who was absent from the State at the time of the hearing. But this witness was present and accessible at the time of the consideration of the motion for a rehearing, one of the grounds of which was the offer to present this competent witness, and that he could testify that the actual value of the plant did not exceed \$200,000. It was the clear duty of the commission under the circumstances to reopen the case and ascertain, if possible, the reasonable value of the plant. The commission is not confined to technical rules of procedure, and as an investigator, its duty was to ascertain the facts so important and basic in reaching its conclusion.

If it was a fact that the value of the plant did not exceed \$200,000, and if the question was to be determined on the Salida plant alone, then the admitted net annual return of

\$34,000, which the evidence shows, furnished a net profit of seventeen per cent upon the investment, which the commission had no right to increase, but on the contrary should have reduced, if it assumed to annul the contract between the parties as to the rates to be charged for the service. The commission found: "In the year 1916, the combined steam and water power plants of the Salida property generated 5,794,780 kw.-hr. and sold to the Smelting Company alone 3,403,037 kw.-hr. In the year 1917 these combined plants generated 6,069,620 kw.-hr., and sold to the Smelting Company 3,369,900 kw.-hr. It appears, therefore, that the sales to the Smelting Company comprise approximately 60 per cent of the total amount of current generated by the Salida plants, and somewhat more than 60 per cent of the current sold or accounted for.

For the year 1917 the cost of steam power plant generation in the Salida plant showed an increase of \$9,362.00 over the year 1916. Apportioning this increase to the Smelting Company on the basis of "use", 60 per cent of such increase in the cost of steam power generation, or \$5,617.00, should be assigned to the Smelting Company. This is the equivalent to an increase of 1.67 mills per kw.-hr., which if added to the present rate of 7.65 mills per kw.-hr., would result in a rate of 9.32 mills per kw.-hr., which appears to be justified on account of the increase in the cost of steam power generation."

It appears that the Power Company was at the time supplying power for the plant of the American Smelting and Refining Company, located at Leadville, under a similar contract entered into about the time of the last extension of the contract with the Ohio company, and covering about the same period, but the rate to be charged under that contract was fixed at 7.5 mills, or .15 mills lower than that fixed in the Ohio company contract. The commission held, in effect, that there was discrimination under these contracts in favor of the Salida smelter, notwithstanding the higher rate paid, and also that there was no discrimination between the rate it fixed for the Salida smelter of 9.5

mills per kw.-hr., and the rate under the contract with the Leadville smelter of 7.5 mills per kw.-hr. Just how or why this excess in rates of 2 mills, or more than 26 per cent of the entire charge to the Leadville smelter should be added to the rate of the Salida smelter without discrimination in favor of the Leadville smelter does not satisfactorily appear, either from the findings of the commission or the testimony in the case.

The commission adopted the arbitrary classification of the Power Company, and then concluded that the consumption of power by the Leadville smelter is double that of the Salida smelter, that the load factors are the same, and that for such reasons the Leadville smelter would earn a lower specific rate per kw.-hr. If we concede the principle, yet it does not appear that the difference can be so great as 26 per cent., particularly when the Power Company itself in its contracts with the two concerns, made at about the same time, recognized a difference in all particulars of only .15 mill and not 2 mills as found by the commission. Every sense of justice demands that the Power Company be held to its contract in this respect, rather than the commission should, through mere speculation and conjecture (and that is the only basis for the finding) add 1200 per cent to the agreed and accepted difference in cost in supplying power to the two concerns.

The holding of the commission on its face in this particular appears to constitute discrimination against the Salida smelter, and in favor of the Leadville smelter. The commission found that: "Since the above mentioned contract was entered into the demands of the community for the service of the Power Company have continued to grow, and as a result further additions have been made to both the hydro-electric and steam plants. The present capacity of the hydro-electric plant is 1200 kilowatts, and of the steam plant in Salida 700 kilowatts, making the total installed capacity of the Salida property 1900 kilowatts."

The testimony is clear that when the contract was made with the Salida smelter, the grantor of the Power Company

was supplying only the city of Salida, and that it had a surplus of power equal to and in excess of the power required by the Salida smelter. That the contract was solicited by the Salida Light, Power and Utility Company in order to find a market for the unused capacity. That the Light and Power Company generated its electrical energy solely by water power, except that it had one steam plant for use in case of emergency; that the smelter was at the time furnishing its own power by means of its own plant, and that in order to use power furnished by the Power Company, it became necessary for the Smelter Company to abandon its steam plant, and to install electrical appliances at great cost. It is clear also that aside from power furnished the D. & R. G. R. R. Co. at Salida, a comparatively small amount, the Power Company installed steam plants and extended lines and incurred other expense in order to supply mining and other industrial companies at great distances from its plant, which proved to be unprofitable. It is also clear that in so doing it incurred the greater part of the expense of its added improvements and increased operation, subsequent to the acquisition of the Salida plant. Such improvements are estimated at \$113,000.00, or more than one-half of the value of the present plant, as that value was proposed to be established by the Smelter Company. It appears also that that Power Company made these improvements and extensions without having obtained the approval of the Utility Commission, or obtaining a certificate of necessity, in direct violation of the statute. It is the very purpose of the statute in this particular to prevent the burden to the public which may arise by reason of speculative or unnecessary extensions and improvements, by means of an investigation by the commission, and the granting of a certificate of necessity.

The Power Company had no lawful authority to make such extensions and improvements and did so in plain violation of the law. If, therefore, it made an unprofitable investment it must bear the burden, and will not be per-

mitted to charge it to the public. It appears that the claim for increased cost in operation of the Salida power plant is based chiefly on the cost arising by reason of such extensions and improvements, and the added cost of steam power used in the operation of the same.

It is not the purpose of the Public Utilities law to make the State the insurer of unlawful, unwise or unnecessary investments by public utilities corporations, and in the absence of the required certificate of necessity, and certainly in the absence of clear proof to the contrary, we must presume that such extensions were at least unnecessary.

The equities of the case are not with the Power Company. The Smelting Company is as much affected in fact with a public interest as is the Power Company. It performs a public service in the treatment of ores from mines from various parts of the State. Without smelters and mills to perform this service for the public, the mining industry of the State must of necessity seriously suffer. Besides, the Smelter Company, in this case, is of vast public interest to the community in which it is located. It furnishes a payroll of about \$300,000 per annum, to which that of the Power Company in the locality is comparatively insignificant.

The testimony discloses that there has been about \$1,000,000 invested in the plant of the Smelter Company, including replacements. Its losses for the year 1908 were \$322,198.97. The plant lost an average of \$70,000 for eleven years. In 1917 there was a profit of \$185,795.52. In 1916 the profit was \$82,072.32, allowing nothing for salaries or depreciation. It was unable at the time of the hearing to operate at a profit and was continuing only in the hope that it might make a profit some time in the future.

To pay the rate fixed by the commission will either compel it to cease operations or increase the price of treatment to its customers. It is a competitor of the Leadville smelter. Such is the testimony in these particulars.

It cannot be said that to sustain one public utility at the expense of another is in the interest of the public welfare, and if we are to rely upon the showing here, this must be the result, if the order of the commission is to be sustained. Yet the interest of the public weal is the only theory upon which the commission can exercise the power to abrogate the contract between the parties. I may repeat that this power is so grave, with such possibilities of being erroneously exercised, through want of proper understanding of the facts and of the principle upon which it is based, that it should be denied or greatly curtailed by an amendment to the statute.

The commission in this case made no investigation of its own, and determined the matter wholly upon the testimony of the contending parties. In such a case the burden is upon the petitioner clearly, which it has not sustained. The sufficiency of the rate prescribed to produce a fair profit upon the value of the property employed in the business is to be strongly presumed. The burden of showing its confiscatory character rests, therefore, upon the complaining company. *Lincoln Gas Co. v. Lincoln*, 223 U. S. 349. The presumption must be correspondingly stronger where the rate rests upon a contract between the parties, understandingly entered into.

The order of the commission is reversed with instructions to dismiss the proceedings.

Reversed with instructions.

En banc.

Teller, J. agrees with conclusion only.

No. 9524.

CITY OF PUEBLO v. PUBLIC UTILITIES COMMISSION ET AL.

1. PUBLIC UTILITIES COMMISSION—*Powers*. The commission is without power to fix rates in municipal corporations organized under Article XX of the Constitution; and does not acquire such jurisdiction even though such municipalities fail to act, or proceed illegally.

En Banc.

Writ of Review to the Public Utilities Commission.

MR. CHARLES M. ROSE, for plaintiff in error.

Messrs. ADAMS & GAST and Mr. SAM PARLAPIANO, for defendants in error.

Mr. Justice Burke delivered the opinion of the court.

THIS cause is now before us on a writ of review to determine the validity of an order of the Public Utilities Commission fixing the rates to be charged by the Pueblo Gas and Fuel Company within the City of Pueblo, which order was entered December 18, 1918. A rehearing was denied by the Commission December 31, 1918. The abstract of record was filed in this court January 29, 1919, and the reply brief of plaintiff in error, September 20, 1919.

The opinion of this court in *City and County of Denver v. Mountain States Telephone and Telegraph Company, et al.*, 67 Colo. 225, 184 Pac. 604, was handed down January 14, 1919, and a rehearing denied thereon October 6, 1919. It will thus be observed that the decision in the last mentioned cause had not become final until after the instant case was at issue in this court.

The City of Pueblo is a body corporate and politic, duly organized and existing under and by virtue of Art. XX of the Constitution of the State of Colorado, and its charter was filed with the Secretary of State prior to the adoption of sec. 6 of said article. In other words the City of Pueblo is a so-called Home Rule City under our Constitution.

The Pueblo Gas and Fuel Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado, is operating exclusively within the said City of Pueblo, and one mile from the outer boundaries thereof. It maintains within said city a plant for the manufacture, generation and distribution of gas for heating, illuminating and power purposes, and operates under

Ordinance No. 851 of said City, duly enacted on the 18th day of September, 1911. Said ordinance fixed the rates to be charged by the said Gas Company from the date thereof up to and including the year 1931, and on the application (No. 20, filed June 26, 1918) of the said Gas Company the Public Utilities Commission of the State of Colorado made and entered its order raising said rates. The City of Pueblo has at all times denied, and now denies, the jurisdiction of the Commission to fix such rates in said city. The facts here are the same as in *City and County of Denver v. Mountain States Telephone and Telegraph Company, et al., supra*, except:

Art. 10, sec. 3, of the Charter of said City of Pueblo, which provides for the fixing of rates by ordinance, recites "That rates, fares or charges shall not be changed without examination by competent inspectors, and the Council shall have power to inspect the books and affairs of any public utility corporation as a part of such examination." This would seem to obviate the particular objection raised by the dissenting opinion of Mr. Justice Bailey in the telephone case.

The same section of the Pueblo Charter also provides: "The Council shall have power by ordinance to fix and regulate rates, fares and charges by public utility corporations and to change the same every five years." But for this provision of the charter it is conceded by defendants in error that the jurisdiction of the Public Utilities Commission to fix the rates in question would be settled here by the decision in the telephone case wherein such jurisdiction was denied. But it is now contended on behalf of defendants in error that by virtue of this five year provision of the charter of the City of Pueblo said city has repudiated the power given it under Art. XX of the Constitution; that the effect of such repudiation, so far as the fixing of the rates of Public Utility Corporations is concerned, is to remove said city from operation of said Art. XX of the Constitution and leave the Public Utilities Commission with jurisdiction to fix such rates therein. This argument is based upon the

assumption that the failure and refusal of the city to readjust such rates oftener than once in five years must necessarily result in inequality and injustice. Whether such will be the result time and experience alone can demonstrate, but if the body having jurisdiction to fix rates by compulsion fixes a rate that is unreasonable or confiscatory, nothing is more definitely settled than that the courts, when applied to under such circumstances, will afford relief.

It having been finally determined that The Public Utilities Commission is without jurisdiction to fix rates in Home Rule cities it is impossible that that body should acquire any such jurisdiction because such cities proceed illegally in the discharge of that duty, or fail to act at all.

We are therefore of the opinion that every question raised in the instant case has been finally settled here in *City and County of Denver v. Mountain States Telephone and Telegraph Company, et al., supra*. The order of the Public Utilities Commission entered herein is therefore hereby set aside and held for naught.

Garrigues, C. J., Scott, J. and Bailey, J. concur, subject to the final disposition of *City and County of Denver v. Mountain States Telephone and Telegraph Company, et al.*, now in the Supreme Court of the United States.

No. 9718.

THE PEOPLE EX REL. v. CHEW.

1. CONSTITUTIONAL LAW—*Civil Service*. The amendment to the Constitution adopted in 1919 (Laws 1919, p. 343) provides that those holding places in the classified service when the amendment takes effect "shall retain their positions until removed, under the laws enacted in pursuance hereof." Respondent was unlawfully holding a civil position when the amendment became of force. Held he was not retained therein by the amendment.
2. WORDS AND PHRASES—*Holding a Position*, means lawfully holding it.

3. JUDGMENT IN ERROR—*Effect.* Quo Warranto, and judgment for respondent. Reversed on Error. *Held* that though the judgment below was not superseded, the effect of the judgment of reversal was to determine that respondent's occupancy of the office was wrongful from the beginning.

Error to Pueblo District Court, Hon. James A. Park, Judge.

Mr. W. O. PETERSON, for plaintiff in error.

Mr. J. H. VOORHEES and Mr. N. WALTER DIXON, for defendant in error.

En Banc.

Mr. Justice Denison delivered the opinion of the court.

THIS is an action of *quo warranto*, to oust respondent from the office of Division Engineer. A demurrer to the petition was sustained, and, upon error this court reversed that decision; 179 Pac. 812, *q. v.* While the case was pending here the so-called Civil Service Amendment to the Constitution was passed, by which a classified civil service was established and defined, which service includes the office of Division Engineer. Upon *remittitur* an answer was filed, the case tried and judgment again rendered for respondent, and the case is here for the second time on error.

The second judgment is based on the amendment, which contains the following: "All persons holding positions in the classified service as herein defined when this section takes effect shall retain their positions until removed under the provisions of the laws enacted in pursuance hereof." S. L. 1919, p. 343. The respondent contends that even if he was wrongfully holding the office, yet since he was an officer *de facto*, he was in the class of "persons holding positions, etc.," and so entitled to retain the position under the above clause. The District Court sustained him in this claim. We think this was error. "In a civilized community 'holding a position' means lawfully holding it." *People ex rel. Hannan v. Board of Health*, 153 N. Y. 513, 518, 47 N. E. 785. But respondent insists that, since the

first judgment of the court below was not superseded, it remained in force until reversed, and so, by virtue of that judgment, he was lawfully holding the position at the time the amendment took effect. We think not. In effect, our reversal of the former judgment determined that respondent was holding the position wrongfully and unlawfully from the beginning of relator's term. Even if the amendment, literally read, includes one wrongfully retaining an office, it is not reasonable so to construe it. *Aggers v. People*, 20 Colo. 348, 38 Pac. 386. Whatever may have been the purpose of the clause above quoted it certainly was not to perpetuate wrongful tenure of office.

The judgment should be reversed with directions to enter judgment for relator upon his right to the office in accordance with the code.

Decided Jan. 5, A. D. 1920. Rehearing denied Feb. 2, A. D. 1920.

No. 9722.

JOHNSON v. WALKER-PLATH MOTOR COMPANY.

1. FRAUD—*Statements of Value*, between parties dealing at arms' length are mere expressions of opinion; so statements as to the value of certain bonds, and that they are "collectible at any bank."
 2. PLEADINGS—*Statutory Denial*, must be in the exact words of the statute. An averment in the reply that "plaintiff has not and cannot obtain sufficient information, &c." held fatally defective.
- The statutory denial is not permitted in traversing the contents of a public record; and the addition of an express denial as a conclusion from the statutory denial does not aid the matter.

*Error to Denver District Court, Hon. Julian H. Moore,
Judge.*

Application for Supersedeas.

Department One.

Mr. C. A. IRWIN, for plaintiff in error.

Mr. L. J. STARK, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE defendant in error brought an action in replevin against the plaintiff in error to recover an automobile of which it claimed ownership and right of possession. Plaintiff in error, defendant below, answered alleging that he had purchased the automobile from the plaintiff, and that soon after its purchase he had executed a chattel mortgage upon it to secure an indebtedness to a bank, and that the mortgage was of record in the office of the County Clerk and Recorder, giving book and page. To this answer a replication was filed alleging that the sale to defendant was induced by certain misrepresentations alleged to have been made by him; that the sale was fraudulent; that the bonds given as the purchase price had been tendered back and a rescission of the contract of sale had been made. Upon the trial, the defendant objected to the introduction of any evidence upon the ground that the complaint did not state a cause of action. This objection was overruled. Defendant objected also that a statutory denial in the replication of defendant's allegations to the giving of the mortgage and the filing thereof was insufficient to raise an issue. This objection also was overruled. Plaintiff had judgment and the case is now here for review.

The allegations of the replication which are supposed to state the misrepresentations upon which the sale was made are as follows: that defendant represented "That the two Rock Island Railway Company bonds of \$1,000 par value each, which were offered in trade for the automobile, were a valid and existing indebtedness of the said railway company; that each of said bonds had the actual cash value of \$780, exclusive of interest thereon; that the accrued interest upon said bonds amounted to \$400 in cash represented by interest coupons attached to said bonds and that said sum of \$400 was collectible at any bank upon presentation of said coupons." It is urged that these statements are not

such as, if false and made fraudulently, would be a ground of action for fraud; that they are mere conclusions, and not statements of any fact.

The parties were dealing at arm's length, and in that situation statements of value are the mere statements of opinion, such as a vendor may be expected to make. Whether or not the bonds were a valid and existing indebtedness depended upon certain facts. No such facts were stated, nor are there any facts stated from which the plaintiff drew its conclusion that the bonds were worthless. The statement that the bonds had a cash value of \$780 is of the same class, only a statement of opinion. That the accrued interest amounted to \$400 and was represented by interest coupons, appears from the bonds contained in the bill of exceptions to be in accordance with the fact. That they were collectible at any bank upon presentation, is also a mere statement of opinion, which is in conflict with the language of the coupons themselves. They state that they are payable at the company's office or agency in the City of New York. It is not contended that any statement of fact was made which subsequently proved to be untrue. We are of the opinion, therefore, that the objection that the complaint stated no cause of action was well taken.

We are of opinion, also, that the second objection to the admission of evidence was good, because no issue was taken upon the allegation of the right of possession in a third person. The statutory denial in reference to that matter is as follows: "That as to whether upon said 16th day of January, 1919, the said defendant and J. C. Boyd borrowed from the Motor Bank the sum of Five Hundred Fifty Dollars and executed and delivered to the said, The Motor Bank, a chattel mortgage, which mortgage it is alleged is recorded in Book 2897 on page 144 of the chattel mortgage records of the City and County of Denver, State of Colorado, in the office of the county clerk and recorder, this plaintiff has not and cannot obtain sufficient information upon which to base a belief, and therefore denies the same.

* * * Section 56 Mills' Code provides that, "In denying

any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegations in issue, for the defendant to state, as to such allegation, that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." It will be observed that the reply in this case merely states that the plaintiff has not and cannot obtain sufficient information upon which to base a belief, omitting the word "knowledge". It has been many times held that the statutory denial must be in the exact words of the statute. *Grand Valley Irr. Co. v. Lesher*, 28 Colo. 273, 65 Pac. 44; *Welles v. Colo. Nat. Life Assn. Co.*, 49 Colo. 508, 113 Pac. 524. This is a general rule in the Code States. The reply is, therefore, bad. It is insufficient also in another respect in that the plaintiff alleges that he has not and cannot ob-

tain information upon which to base a belief, although the source of such information is a party to the suit.

41 Wis. 436; *Pomeroy Code Remedies* (2d ed.) § 100. The adding of the words "therefore denies the allegation" does not make the answer good. *San Francisco Gas Co. v. San Francisco*, 9 Calif. 453; *State v. Butte Water Co.*, 18 Mont. 199, 44 Pac. 966; *Corbin v. Commonwealth*, 59 Ky. (2 Met.) 380. The statutory denial was intended to be used only when the circumstances of the case are such that the party pleading cannot, from want of knowledge or information, and inability to obtain the information, fairly admit or deny an allegation in the opposing pleading. It was not intended as an excuse for failing to deny specifically, or generally, when that could be done by proper effort to obtain the required information. The plea of property in a third person was, therefore, not denied. This defeated plaintiff's right of recovery, and the holding to the contrary was error. The judgment is accordingly reversed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9341.

YOUNG v. HINDS ET AL.

TRUSTS—*Resulting Trust.* Walker, an agent of plaintiffs, lent considerable sums of money for their account secured by trust deed of lands. He afterwards obtained possession of the notes, foreclosed the mortgage, caused the lands to be conveyed to one Schaffer, caused Schaffer to execute his deed of trust of the lands for securing a note of \$7,000 payable to Walker, caused Schaffer then to convey the lands to another, subject to deed of trust for \$7,000, and caused a deed of trust of the same lands to be executed by the one holding the title, for securing a note of \$3,000 to the defendant. All these transactions were without the knowledge of plaintiffs. *Held* that the plaintiffs having provided the funds which secured the lands, a trust resulted in their favor superior to the claims of plaintiffs, and a conveyance to them ordered.

Error to Denver District Court, Hon. John I. Mullins, Judge.

Mr. EDWARD D. UPHAM and Mr. W. E. RICHARDS, for plaintiff in error.

Messrs. DOUD & FOWLER, for defendants in error.

Mr. Justice Scott delivered the opinion of the court.

THIS case was submitted to the trial court upon an agreed statement of fact, with separate prayers for relief by the opposing parties. It appears that one R. J. Walker had been for some years the common loan agent for Alona A. Hinds, Elizabeth D. Milliken and Lucie S. Young. It was his custom in the matter of such agency to loan moneys of each of such persons on real estate security. The promissory notes in each case were sent to the separate owners, while Walker retained possession of the securities.

In February, 1910, The Colorado Fruit and Garden Company executed and delivered to Walker as payee two promissory notes in the sums of \$2,500.00 and \$1,750.00 respectively. These notes were secured by a trust deed covering the north $\frac{1}{2}$ of the North West $\frac{1}{4}$ of Section 31 in Town-

ship Two (2) South of Range 68 West, excepting therefrom an irregular tract containing about ten acres. The trust deed ran to Edward R. Locke as trustee. Afterward the \$2,500.00 note was assigned by Walker without recourse, to Mrs. Hinds, and the \$1,750.00 note was likewise assigned to Mrs. Milliken, and the notes were mailed to the several parties. These notes represented moneys of the parties which Walker held for investment for them.

In April, 1912, Walker wrote to these clients, requesting the return of the notes, stating that the matter of collecting the interest was giving him some trouble, and that he wanted to do something with them. The notes were delivered to him as requested.

In May of the same year Walker brought suit to foreclose the trust deed. The property was sold under decree of court for the aggregate amount due on the two notes and costs of the suit, and the notes cancelled in judgment. The sale was made to Locke at the suggestion of Walker. Walker caused Locke to assign to one Louis B. Schaffer the certificate of purchase, and sheriff's deed issued to Schaffer on January 27, 1914. Neither Walker, Locke nor Schaffer had any personal interest in the notes, and these were the sole consideration of the sale, under the judgment of foreclosure. Schaffer then gave to Walker a note for \$7,000.00 which he purported to secure by a trust deed on the premises. This note was found unendorsed among Walker's papers after his death.

On the second day of February, 1914, Schaffer, at Walker's direction conveyed the premises by warranty deed to Locke subject to the trust deed. Neither Schaffer, Locke nor Walker had any actual interest in the premises and no consideration passed. Schaffer and Locke appear to have been mere dummies in the transaction. Neither Mrs. Hinds nor Mrs. Milliken had any knowledge of these proceedings.

Walker's other client, Mrs. Young, held a note of one Ratekin, secured by a mortgage on other lands, in the sum of \$1,500.00, and also a note in the same amount by one

Killiam, likewise secured by mortgage. Walker wrote Mrs. Young requesting the return of these two notes for the purpose of taking them up and reinvesting them. The notes were sent to him as requested. Walker then had one Robert M. Roop execute a note to Mrs. Young in the sum of \$3,000.00, being the amount of the two notes which Mrs. Young had returned to Walker for reinvestment, and purporting to be secured by trust deed upon the same tract of land as covered by the trust deed given by Schaffer, being the premises involved in this suit. The record does not disclose what became of the securities of Mrs. Young as for the Ratekin and Killiam notes. On February 16, 1914, Walker wrote to Mrs. Young enclosing the \$3,000.00 Roop note saying that "it was secured on valuable land close to Denver."

Walker, Locke and Mrs. Young died prior to the institution of this suit, and Robert T. Young appears as the administrator of the estate of Mrs. Young. Neither Walker nor Roop had any interest in the notes which Mrs. Young returned to Walker for the purpose of reinvestment. Walker seems to have been no respecter of persons in his attempt to defraud all these clients alike.

It is the contention of Mrs. Hinds and Mrs. Milliken that there was a resulting trust in the land in question at the time of the foreclosure and sale, and that the subsequent acts at the direction of Walker in so far as they affected their interests were without notice or authority and are void. The administrator of the estate of Mrs. Young contends that there was an equitable assignment by Walker of the \$7,000.00 Schaffer note to Mrs. Young and that she for such reason acquired a superior lien on the premises involved. If the contention of the defendants in error can be sustained, then the question of equitable assignment is not material and need not be considered.

The court found and decreed that the defendants in error, plaintiffs below, are the joint owners of the premises in fee simple in proportion to their several interests and ordered the cancellation of the Schaffer trust deed given as

alleged security for the \$7,000.00 note, and directed that the defendants, Martha W. Locke as sole heir of Edgar Locke, deceased, and as administratrix of the Walker estate execute and deliver to plaintiffs a deed for the premises in proportion to their several interests, and to likewise execute a release of the Schaffer' mortgage. This judgment is before us for review.

It is clear that the plaintiffs furnished the sole and only consideration for the purchase of the premises at sheriff's sale; that Walker acted only as their agent; and that plaintiffs were at the time clearly entitled to the sheriff's deed. It is elemental that where one person takes a conveyance in the name of himself or a third person, the consideration for which is furnished by another, that a resulting trust arises in favor of the one furnishing the consideration. In this case the plaintiffs owned the mortgage debt which furnished the sole consideration for the sale under foreclosure. If Walker had any authority to institute the foreclosure and procure the sale, it was only as the agent of the plaintiffs and for their use and benefit. The principle stated has been expressed in a long line of decisions by this court. It was said in *Lipscomb v. Nichols*, 6 Colo. 290, that the "rule is well settled that when land is purchased for which one party pays the consideration, and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration."

In *Walker v. Bruce*, 44 Colo. 109, it was said: "It has been frequently stated that resulting trusts, or those created by operation of law, are, first, when an estate is purchased in the name of one person, but the money or consideration is given by another; second, where a trust is declared only as to part, and nothing is said as to the rest; and, third, in certain cases of fraud where transactions have been carried on *mala fide*." The facts of this case bring it clearly within the rule. See also *Cree v. Lewis*, 49 Colo. 186; *Leroy v. Norton*, Ibid, 490; *Payne v. Martin*, 39 Colo. 265; *Doll v. Gifford*, 13 Colo. App. 67; *Warren v. Adams*, 19 Colo. 515; *McPherrin v. Fair*, 57 Colo. 337.

The question of innocent purchaser for value does not arise in this case. The relationship of Mrs. Young and Walker was that of principal and agent. Walker acted as her exclusive agent in the premises and his knowledge of the facts must be attributed to his principal.

The judgment is affirmed.

En banc.

Denison, J., dissents. Teller, J., not participating.

No. 9282.

AMERICAN SURETY COMPANY v. CRESSON CONSOLIDATED
GOLD MINING AND MILLING COMPANY.

1. APPEAL AND ERROR—*Distinguished.* An appeal from a judgment is a continuation of the action in which the judgment was given.

A writ of error is a new and different action.

2. SURETY IN INJUNCTION BOND—*Rights.* Defendant applied for an injunction to restrain the sale of its properties for taxes. Plaintiff became surety in the injunction bond and defendant entered into an agreement to pay \$125.00 on a specified day in each year, until it should "serve competent and written evidence of plaintiff's discharge." Plaintiff was entitled to the specified annual premium pending a writ of error.

Error to El Paso District Court, Hon. John W. Sheafor, Judge.

Mr. WILLIS L. STRACHAN, Mr. T. C. TURNER and Mr. JOHN A. CARRUTHERS, for plaintiff in error.

Mr. HILDRETH FROST, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS is an agreed case between The American Surety Company of New York, plaintiff, and The Cresson Consolidated Gold Mining & Milling Company, defendant, to determine the liability of the defendant for the payment of

premiums on an injunction bond, during the time proceedings were pending on error. Judgment was for defendant, and plaintiff brings the case here for review.

From the agreed facts it appears that defendant applied to the District Court of Teller County for a temporary injunction to restrain the County Treasurer from selling certain mining property. A temporary writ was granted in November, 1911, to issue conditioned on the giving of a bond in the sum of \$25,000.00, pending final determination of the suit. Plaintiff became surety on the bond, and the premium was fixed at \$125.00 per annum until the surety company had legal evidence of its final discharge from such suretyship.

In December, 1911, the temporary injunction was made permanent and later the defendant brought the record here on error. In March, 1914, the judgment of the District Court therein was affirmed.

The plaintiff bases its right of recovery of annual premiums, for the period in which the proceedings on error were pending and undetermined, on the theory that there was a continuing liability under the bond, and that had the judgment on review been reversed it would have been liable as surety. No cases directly in point have been cited by either party, and we think there are none. Those from this jurisdiction involve cases wherein appeals were taken to this court, and as an appeal is confessedly a continuation of original suit the rule announced in such cases has no application here, as it is settled that a writ of error is not a continuation of the original cause, but is a new, distinct and separate action. Nevertheless, it is also true that had the judgment in which injunction issued and bond was given been reversed, the surety would have been liable. *Joyce on Injunction*, Vol. 1, page 380; *Tutty v. Ryan*, 13 Wyo. 134. That such liability might exist, and was in contemplation by the parties at the time of entering into the contract of suretyship is plain from the terms of the bond itself, a part of which provides for the contingency of appeal or writ of error in the following terms: "That the

indemnitor (The Cresson Company), will immediately pay the surety (The American Surety Company), at its office, 100 Broadway, New York City, One Hundred and Twenty-five Dollars (\$125.00) on the 28th day of November in each year hereafter and until the indemnitor shall serve upon the surety competent, written, legal evidence of its final discharge from such suretyship, and all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability."

If the above excerpt means anything it means that the Cresson Company agreed to pay the specified premium each year while the cause was in litigation, and that such liability should exist until the time for appeal or writ of error had expired. From the terms of the application it is manifest that the possibility of review on error was in contemplation at the time of making the contract, and the provision thus made was clearly intended to keep the bond good until the termination of review proceedings, however prosecuted. The sole purpose of the writ of error was to have the judgment below reviewed and reversed, if it contained error, and the effect of such judgment would have been if reversed here, to make the bond liable. In any event it is clear that such is the effect and purport of the express terms of the contract.

The judgment of the trial court is manifestly erroneous and the cause is therefore remanded with directions to enter judgment for plaintiff in error for the amount specified in the agreed case, as being due the bonding company should it establish its right of recovery herein.

Judgment reversed and cause remanded, with directions.

No. 9402.

NATIONAL SURETY COMPANY v. CANON BLOCK INVESTMENT COMPANY.

Plaintiff was surety in the bond of a bank where the county treasurer deposited the moneys coming to his hands for taxes. A practice grew up by which the treasurer would deliver to the bank a receipt for the taxes of customers of the bank, and the bank would give credit to the treasurer for the amount of these receipts. The bank having failed the surety company was made liable for and paid to the treasurer, the total of the amounts so credited to him upon the books of the bank, and lost by its failure, and the treasurer paid the amounts to the county. In the bond of plaintiff to the treasurer Canon, was a provision that in case of payment of a claim under the bond the company "shall be immediately subrogated to all the rights of the obligee, to the amount of such payment," and the surety company brought its action claiming that the taxes upon the property of defendant were discharged out of the money which it had paid to Canon and that it was entitled to be subrogated to his right as treasurer to enforce a claim against defendant's property to the amount of the tax, so discharged. *Held* that this contention was based upon the false assumption that the treasurer paid the tax with the proceeds of the judgment against plaintiff; that, in fact, in paying the judgment plaintiff paid no judgment to Canon, but a debt which it owed, not to Canon in his own right, but as county treasurer, and having paid nothing to him, it was not subrogated to any right of his.

Error to Mesa District Court, Hon. Thomas J. Black, Judge.

Messrs. McMILLIN & STERNBERG, for plaintiff in error.

Mr. BENJAMIN GRIFFITH, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE principal facts involved in this case are fully stated in *National Surety Company v. Canon*, 62 Colo. 401, 163 Pac. 284, and a brief summary thereof is sufficient for an understanding of the question here presented.

The treasurer of Mesa County had designated the Mesa County National Bank as a depository of county funds, and,

to protect himself against loss, he took from said bank an indemnifying bond, on which plaintiff in error was surety. Thereafter the bank failed, and was put into the hands of a receiver. The treasurer claimed that, at the time of the bank's failure, he had a substantial balance of county funds on deposit therein. The plaintiff in error, as surety, disputed a part of his claim, and suit on said bond was brought by the treasurer to recover the amount so in dispute. He had judgment, which was affirmed in the above named case. Thereupon the Surety Company paid the judgment, and the amount so paid was by said treasurer paid to said county, as money for which he was accountable to it. The Surety Company, claiming that it had thus, in effect, paid the taxes on the property of defendant in error, brought suit against it to recover the amount so paid. A demurrer to the complaint was sustained, and the action dismissed. The cause is now here on error.

The additional facts material to this review are as follows: One Adams was the president of said bank, and was also the president of a company which then owned the property now sought to be made liable for the taxes which the Surety Company alleges it has paid. Following a practice shown to have prevailed for several years, the county treasurer, at the request of Adams, delivered to him at the bank, receipts for the taxes on said property and other property, and received from Adams a deposit slip showing a deposit of the several sums named in said tax receipts.

In the case above mentioned we held that, since the evidence established the fact that the bank had, for several years, thus paid its taxes, and the taxes of certain of its depositors, the county treasurer was justified in treating the transaction as a payment of taxes, and a deposit of money to his account, the bank being held bound by its acquiescence in the acts of its officers in a series of similar cases. Plaintiff in error contends that in paying the judgment it paid said taxes, and that it is subrogated to the rights of the county treasurer to enforce the claim for taxes against the property.

The fault in this argument is that it starts with a wrong premise, i. e. that Canon, the county treasurer, paid the taxes on this property with the proceeds of the judgment. In the former case we held that Canon, as county treasurer, had a certain sum in the bank, which he had deposited as money paid on these and other taxes, by the transaction above mentioned. The deposit was, in effect money which Canon had collected for the county. The obligation expressed in the bond was to pay over such sums as had been deposited in the bank as the designated depository of funds of the county treasury. When the money was paid him on the judgment, he received it as county funds, and was thus enabled to account for the money which he had, as we held, collected on the taxes. Had he not been protected by the bond, he, or his bondsmen as county treasurer, would have been compelled to make good the deficit caused by the bank's default. The Surety Company paid no debt of Canon's; it paid the debt which the bank owed him as county treasurer. Not having paid anything for him, it is not subrogated to any right of his, if he had any.

Had the bank continued in business, and charged the items on the deposit slip to the respective depositors for whom taxes were paid, it would have had a valid claim on them for reimbursement. The fact of its failure and ceasing to do business does not affect the situation in the eye of the law. It would appear, then that the receiver had a claim against said depositor, which, if collected, would inure to the benefit of all the bank's creditors, including the plaintiff in error. If plaintiff in error had really paid the taxes, instead of merely paying the county treasurer money which its principal owed him, the cases cited on subrogation would be in point. As it is they have no bearing on the case.

We are of the opinion that the action was wrongly conceived, and that the demurrer was properly sustained.

The judgment is accordingly affirmed.

Affirmed.

Decision *en banc*.

Justices Scott and Burke dissent.

Nos. 9284-9285.

KILKER v. THE PEOPLE.

WEST v. THE PEOPLE.

1. INTOXICATING LIQUORS—*Statute Construed*. Liquors imported by a citizen for his own use, are not, while in transit, or awaiting delivery by the carrier, or being taken by the citizen to his house, kept in any place, in violation of sec 13, of c. 98, of the Acts of 1915. An officer has no power to take possession of the liquors under these circumstances, and the importer is entitled to maintain replevin against the officer, pending a criminal prosecution under the statute.
2. PLEADINGS—*Demurrer Sustained—Effect*. Sustaining a demurrer to the answer and entering judgment on the pleadings, without hearing evidence, admits the allegations of the answer. For the purposes of review they are taken as confessed.

*Error to Arapahoe County Court, Hon. Geo. W. Dunn,
Judge*

Mr. F. T. JOHNSON and Mr. S. H. JOHNSON, for plaintiffs in error.

Mr. SAMUEL W. JOHNSON, District Attorney, and Mr. CHARLES E. FRIEND, for The People.

Mr. Chief Justice Garrigues delivered the opinion of the court.

PLAINTIFFS in error were each sentenced for contempt by the County Court of Arapahoe county for bringing, while criminal actions against them were there pending, a replevin suit in that court to recover from the relator the possession of two shipments of liquor which he, as sheriff, had seized in the depot without an affidavit or warrant.

April 26, 1917, separate criminal informations were filed in the County Court at Littleton against John Kilker and J. J. West, by the District Attorney upon information received from relator, E. F. Burden, as sheriff of Arapahoe county. The first count charged them with unlawfully importing liquor for sale or gift, and the second with

unlawfully keeping it for sale or gift in violation of sec. 1 of the liquor act of 1915, and the third count charged them with unlawfully receiving more than two quarts of whiskey at one time in violation of the liquor act of 1917. May 8th each defendant commenced a replevin suit to recover possession of his shipment seized by the sheriff in the station. The coroner served the replevin writ upon the sheriff who gave bond and retained possession. May 9th relator filed the complaints praying for their arrest and punishment for contempt of court for bringing the replevin suits.

For a better understanding of the case it may be well to state that the acts charged in the criminal cases, involving the same shipments of liquor, the same defendants, and the same transactions, were before us in *Kilker and West v. The People*, 66 Colo. 75, 179 Pac. 145, from which it appears that defendants, who were gardeners living near Englewood, each ordered on April 20, 1917, 15 cases of 24 pints each of whiskey shipped to them by freight from Cheyenne to Englewood. The shipments arrived in Denver over the C. & S. R. R. on the 21st, were transferred to the Santa Fe, and on the 23rd arrived at their destination, where they were held in the freight depot awaiting delivery to the consignees. The next day the station agent notified them, and on the 25th they went to the station with a wagon to get the shipments. At the request of the agent they each signed the consignee's affidavit required by sec. 8 of the 1915 act. West paid the freight charges on his shipment, Kilker made arrangements with the agent to come back for his afterwards, and then they went to the freight room to get West's shipment and take it home. He (West) backed the wagon up to the door while Kilker went inside intending to carry it out. In hunting for West's name on the cases, Kilker reached over the pile, loosened up a case and pulled it toward him about half way off the pile, when some remark was made about how they would load it. At this point, but before any of the cases were loaded or removed from the pile, the officer, without a

search warrant, seized the liquor in the station, placed defendants under arrest, and against their protest ordered them to load both shipments into the wagon and drive to Littleton courthouse. They objected to this, but while under arrest he compelled them to load all the cases into the wagon, and drive to Littleton where he placed the men in jail, and as far as defendants know has ever since retained the possession of the liquor. The sheriff then informed the District Attorney, and the next day he filed in the County Court a criminal information against each defendant verified by the sheriff, which were consolidated and tried as one case.

Upon the trial of that part of the criminal case based upon sec. 1 of the act of 1915, the jury acquitted defendants upon the charge of unlawfully importing, and the District Attorney dismissed the second count for unlawfully keeping the liquor, and the jury convicted them upon the charge of receiving more than two quarts at a time based upon the law of 1917. We reversed this conviction (see 179 Pac. 147) upon the ground that the 1915 act as amended in 1917, taken as a whole, was an importing statute, the restriction of which against receiving more than two quarts at a time did not relate to liquors already imported, and at the station before the act of 1917 went into effect.

No complaint of any kind was ever filed against the liquor, and no order of court entered that it be held for any purpose, and no affidavit was made, and no search warrant issued under sections 11 and 12 and no action or special proceeding ever commenced other than the criminal complaint against the defendants. The officer claimed to act under, and based his authority upon sec. 13, Liquor Laws of 1915.

Defendant West's answer in the contempt case, after denying and admitting certain allegations of the complaint, alleged in substance that his home and private residence was on a garden tract near the town of Englewood in Arapahoe county; that about April 21, 1917, to supply him-

self and for his own personal use, he sent an order to Cheyenne to have shipped to him by railroad transportation, the liquor in question, to be taken from the Santa Fe depot by him and conveyed to his home and residence near the town of Englewood; that the liquor was shipped as ordered, and arrived at the depot about the 25th; that he went with a team and wagon to get the shipment and haul it out to his home and private residence; that he complied with the law then in force pertaining to the purchase and importation of intoxicating liquors for personal use in private homes and residences; that before he secured possession of the liquor, and while it was in the station, relator as sheriff seized the shipment, placed him under arrest at the depot, and ordered him to put the cases of liquor in his wagon and haul them to the sheriff's office at Littleton, which defendant did under compulsion; that the liquor was unloaded under the sheriff's direction at Littleton, and taken into his custody where, as far as he knows, it has remained ever since; that no complaint was ever filed against the liquor, or demand made that it be placed in the custody of the court for any purpose; that the shipment was seized by the sheriff in the railroad depot, while in course of transportation to defendant's home and private residence, but before he had taken possession of it, without any affidavit made, or search warrant or process of any kind issued or directed against the liquor, and is now held by the sheriff without process of any kind; that he began the replevin suit for the purpose of trying the right of possession which was commenced in the same court wherein the criminal informations were pending; that the shipment had been wrongfully and illegally seized, and taken out of the depot and kept by relator, and the replevin action was commenced in good faith, for the purpose of obtaining possession. Kilker's answer is the same.

A demurrer to the answer was sustained in each case and they elected to stand by the answer, whereupon judgment was entered against them on the pleadings without any evidence whatsoever, and they bring the case here for review upon error.

Garrigues, C. J., after stating the case as above.

Sustaining the demurrer and entering judgment on the pleadings without evidence admitted the allegations of the answer which for the purpose of review are taken as confessed. Defendant, for his own personal use in his home, ordered, under the liquor statute of 1915, a consignment of liquor from Cheyenne. The sheriff seized the shipment in the station without an affidavit and warrant while defendant was there with his wagon intending to get it and take it to his home, arrested defendant, and has ever since kept the shipment. The next day the District Attorney filed a criminal complaint in the County Court against defendant at the suggestion of relator, before the trial of which defendant brought a replevin suit to obtain possession of the liquor, for which he was adjudged to be in contempt of court and sentenced to jail. The only question in review is whether it was contempt of court to bring the replevin suit while the criminal action was pending.

Whatever power and authority the officer had in the case is found in sec. 13, Intoxicating Liquors Law of 1915. It provides in substance: That any sheriff, having personal knowledge or reasonable information that intoxicating liquors are kept in violation of law in any place, shall search such suspected place without a warrant, and without any affidavit being filed, and if the officer finds upon the premises intoxicating liquors, he shall seize the same, and arrest any person or persons in charge of such place, or aiding in any manner in carrying on the business conducted in such place; and shall take the person with the liquors so seized forthwith before a justice or a judge, and without delay make and file a complaint for such violation of the law as the evidence justifies.

If the sheriff exceeded his authority or jurisdiction under this section, that is, had no power to seize the liquor, defendant had a right to replevin the shipment, and the county court had no jurisdiction to punish him for contempt in doing what he had a right to do. Under the act of 1915 it was lawful for defendant to import and keep the

liquor in question in his home for his own use, and while it was in transit on the railroad, or at the station awaiting delivery or being taken from the station to his home, it was not kept in a place in violation of any statute within the meaning of sec. 13. The answer admits the liquor was imported for defendant's private use in his home, and was at the station awaiting delivery, and while he was there for it intending to take it to his home for his own use the officer, without affidavit or warrant, seized the shipment in the station and took it out of the station and retains possession. The sheriff in such a case had no power, authority, right or jurisdiction to seize the liquor under this section. It was not kept there within the meaning of the section, but was in transit to defendant's home and only held for delivery by the carrier to the consignee. The station agent, and not defendant, was in charge of the station, and it cannot be said that he was conducting a liquor business by delivering a proper shipment. Even if the officer obtained possession at the station from defendant, as alleged in the complaint, it was not kept in a place while being carried home by him any more than it was kept in a place while in transportation from Cheyenne or at the station awaiting delivery. For this reason the officer in searching the station, and making the seizure exceeded his power or authority under the admitted facts. Sec. 13 was intended as an aid in the arrest and conviction of persons selling or giving away liquor in violation of law by discovering and summarily seizing, without an affidavit and warrant, liquor kept, hidden or stored away upon premises, or at a place, for sale or gift which when produced in court as evidence would tend to convict the person. In such a case, if the officer making the search and seizure acts within the provisions of sec. 13, that is, does not exceed his power and authority under this section, he has a right to seize and retain possession of the liquor as evidence on the criminal trial against the person arrested, and as a rule replevin would not lie, until after an acquittal of the person and refusal to give up the possession. In this case how-

ever the undisputed facts show affirmatively that there was no power or authority to seize the liquor under the provisions of sec. 13, hence defendant had a right to replevin at any time. This issue was raised by answer and should have been tried, and it was error to sustain the demurrer. Relator was called upon to show his authority for seizing the shipment. It is not like the case where an officer searched a person and took from him concealed weapons, there the statute expressly confers such power.

Reversed and Remanded.

Mr. Justice Scott and Mr. Justice Denison concur.

No. 9436.

OLSON v. HARVEY.

1. ACCOUNT—*Who Entitled—Joinder of Causes of Action.* Defendant, a builder having a contract for the erection of a cathedral, employed plaintiff to superintend the work, for certain salary and a percentage of the profits. This contract was admitted. Plaintiff alleged another similar contract as to the superintendence of the work of construction, upon another important building. This contract defendant denied. *Held* that plaintiff being entitled to an accounting of all the gains made upon both the contracts had properly joined them in one count, demanding an account of all profits on both contracts; that the provisions of the code, sec. 76, have no application. That the parties were not partners was immaterial.
2. PLEADINGS—*Separate Causes of Action—Statement of.* Plaintiff in single count set up two contracts, demanding an accounting under each. The two contracts were separately stated. *Held* that though the words, "And for a second cause of action" were not inserted preceding the statement of the second contract there was no confusion of the issues and the defendant was not misled.
3. —*Action Premature.* Must be specially pleaded.
4. —*Amendment.* Defendant's application for leave to amend his answer so as to forfeit all plaintiff's interest, held properly denied.
5. *Waiver.* Answer after the denial of a motion to separate causes of action is a waiver of the motion.

6. — *Performance by Plaintiff.* Where mutual dealings have been had by the parties, under a contract not yet fully performed, plaintiff is entitled to an accounting as to the part performed, and no allegation of full performance is necessary.
7. — *Accounting—Jury.* Defendant in a bill for an account is not entitled to trial by jury, even though he denies one of two contracts upon which the account is demanded.
8. — *Jury.* A jury having been called to try one phase of the controversy, *held* that the court was entitled to modify the verdict.
8. *CONTRACT—Construed.* An oral contract between a building contractor and his foreman was held by the court below to entitle the plaintiff to one-half the net profits arising from a certain building, unless they should be less than, &c., in which case one-third. *Held* clear, definite and sufficient.
9. — *Waiver of Contract Right.* Contract providing that plaintiff should be entitled to one-half the profits of one of two contracts, but only on condition that his services were "faithfully and diligently performed to the satisfaction of the architect." Defendant having made payments to plaintiff on account of the profits during and after the alleged misconduct, and presented an account after the completion of the building, making an allowance to plaintiff on account of profits, *held* a waiver of the condition. Defendant presented an account of certain dealings between the parties offering payment of the balance as stated therein, without suggesting that the time of settlement had not arrived. *Held* a waiver of this objection, and a dispute having arisen, plaintiff's bill for an account was sustained and defendant's contention that his action was premature rejected.
10. — *Defenses.* Defendant agreed to pay plaintiff a share of the profits upon certain work when all the indebtedness incurred by defendant in the execution of the contract should have been discharged. On account of his profits being demanded, *held* he could not make his own delinquency in paying the liabilities incurred by him in the work the basis of a claim that the action was premature. But *held* that he was not to recover one-half the profits in full, if his misconduct caused damage to defendant. He who seeks equity must do equity.
11. *PRACTICE IN ERROR—Judgment.* The judgment being reversed for the referee's refusal to hear evidence as to one feature of the case, upon which he was entitled to be heard, the cause was remanded with directions that it should be referred to the same referee to hear evidence upon this question alone.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Department Two.

Messrs. HILLIARD & FINNICUM and Mr. W. B. MORGAN, for plaintiff in error.

Messrs. DOUD & FOWLER, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

THIS was a suit for an accounting. The plaintiff Harvey and the defendant Olson built St. John's Cathedral and several of the buildings at Clayton College, on contracts between Olson and the owners. For the cathedral contract Olson and Harvey entered into a written agreement whereby Harvey was to superintend the work for Olson for \$20.00 per week, and one-half the profits. This contract was not disputed. For the college contract there was no written agreement between Olson and Harvey. Harvey alleged an oral agreement which Olson denied. This issue was tried by jury and a verdict was rendered for Harvey. Thereupon an accounting was had, upon both contracts, before a referee, who found Olson indebted to Harvey in the sum of \$26,480.39, with interest at 8% from December 6, 1911, and that defendant pay the costs. His findings were sustained by the court and defendant comes here on error.

1. The complaint, in form, stated one cause of action. It is objected that two causes are commingled, because the contracts with the cathedral and college authorities were separate, the contracts between Olson and Harvey relating to them were separate and, since the college work, though begun later, was finished first; the causes of action therefore arose separately; and counsel for plaintiff in error cite *Hall v. Cudahy*, 46 Colo. 324, and *Pinnacle Co. v. The People*, 58 Colo. 86, 89, which hold that the provision of the Code 1908, sec. 76, that causes be separately stated is mandatory. They argue that, according to Pomeroy's analysis of causes of action, violations of separate primary

rights give rise to separate causes of action. That Harvey had two primary rights, if he had any, one created by his agreement with Olson in regard to the cathedral, and the other by their contract as to the college; that therefore the refusal to order the separation was reversible error.

It is true that in the cathedral matter, Harvey might have relied on his primary right created by Olson's promise to pay him, and so have sued in assumpsit, and he might have sued on another primary right in the college matter alone, but he had still another primary right, that is to an accounting, and Olson owed him another primary duty, which was to account in all matters between them, the cathedral matter as well as that of the college, and, since the complaint showed that these two matters had run on together and that Harvey's share of the proceeds of both had been mixed and appropriated by Olson and converted to his own uses, Harvey, for that reason also, had a primary right to an accounting in both matters, and Olson's refusal to account in the college matter, and his partial and inaccurate account in the cathedral matter gave plaintiff one cause of action.

Nor is Olson's position better if we suppose defendant in error had but two primary rights, as assumed by Olson's counsel.

In the cases above cited it is indicated that the refusal to order separate statement may or may not be prejudicial error. In this case it is not prejudicial. The causes, if there be two, are separately stated if we merely prefix to paragraph 7th of the complaint the words "For a second cause of action"; therefore defendant was not misled nor were the issues confused. These issues were tried as they ought to have been if the amendment had been made. So denial of the motion to separate, if it had been error, would in this case have been without prejudice.

2. The next objection argued is that these two causes of action were not such as might be joined. This objection was waived by answering over. Code 1908, sec. 79. *Hall v. Cudahy*, 46 Colo. 324, 326, 104 Pac. 415; *Hayden*

v. Patterson, 39 Colo. 15, 17, 88 Pac. 457; *Bd. Commrs. El Paso County v. City of Colo. Spgs.*, 66 Colo. 111, 180 Pac. 301, 302; *Field v. Kincaid*, 67 Colo. 20, 184 Pac. 833; *Sweet et al. v. Barnard*, 66 Colo. 526, 182 Pac. 22.

3. It is claimed that defendant was denied trial by jury upon the issues whether Harvey had performed the cathedral contract and whether the action so far as it concerned that matter was prematurely brought.

It is clear that this case is of equitable cognizance. The code 1908, § 223, provides that the court may send such a case to a referee, which was done in this case, and this court has held, that, if a case requires an accounting for complete determination, all the issues may be referred. *Huston v. Wadsworth*, 5 Colo. 213. There was, then, no error in denying a jury.

4. It is objected that the action on the cathedral matter was prematurely brought. The contract between Olson and Harvey provided that the plaintiff's share in the profits should be paid when defendant had fully performed his contract, had received full compensation, had paid all claims for labor, machinery, etc., and the work had been accepted; that Harvey should have no interest whatever in and to the money received by Olson until full, final and satisfactory settlement of all matters relative to said contract between Olson and the owners should have been made and all indebtedness incurred by Olson in carrying out said contract should have been paid, which indebtedness Olson agreed to pay promptly when due.

It appeared that when the suit was brought, some \$50 worth of work in cleaning up the cathedral premises remained to be done and was done afterwards; that \$193.50 was paid to Olson nearly a year after the building was accepted and some ten months after suit was begun for "extras" not within the original contract; that a few trifling bills of Olson's for work or materials remained unpaid, and these facts are made the basis of the claim that the suit was prematurely brought.

As to Olson's unpaid indebtedness he had agreed to pay

it promptly when due, and he could not make his own delinquency a basis of postponing settlement with plaintiff.

As to the other points the referee held that Olson had waived them before suit was begun. We think this was right, because Olson had presented a statement of account, offered full payment of the balance thereon, without suggestion that the time for settlement had not arrived; and settlement between the parties was prevented by a dispute as to the accuracy of the account presented, not because the accounting was premature.

It would, we think, be unjust to allow one from whom an account was about to become due to present it, dispute about it, offer to pay the balance and treat the accounting as due, and then, when the account had been rejected as inaccurate and wrong and when suit was brought for an accounting, say that it was premature. That is "It is time to settle my way but not yours." It is evident that both parties, up to the time of the suit, treated these items as too trifling to consider. Such things are inevitable after every large work. It is also true that this defense should have been specially pleaded in abatement. *Watson v. Lemen*, 9 Colo. 200, 202. An amendment allowing a plea in abatement would be at least unusual.

5. Error is claimed on the ground that since the jury found that the interest of the plaintiff in the college matter was other than a partnership, the action as to that matter was one of law.

This is answered by what we have said above as to the right to an accounting. After the special findings of the jury the court might modify them (which it did) by making findings of its own.

6. It is claimed that the finding of the court that there was an agreement between Olson and Harvey that they were to share equally the profits of the college contract is not supported by the evidence. We do not agree with this claim. There was sufficient evidence in favor of the finding of the court to support it.

7. It is claimed that the agreement with reference to

the college was so indefinite and ambiguous as to be unenforceable. We do not think so. The court found plaintiff "entitled to one-half of the net profits, or net proceeds, arising from said Clayton College buildings and contracts, unless said net proceeds should be less than six thousand dollars, in which event he is entitled to one-third of such net profits, or net proceeds." This is clear, definite and sufficient, and there was evidence to support it.

8. It is objected that the court below ordered an accounting on the cathedral matter without a trial of the issues in regard to it. We have already shown that those issues were properly submitted to the referee.

9. The general demurrer to that part of the complaint relating to the cathedral was overruled. The complaint stated that the contract between the plaintiff and defendant provided "that plaintiff should personally superintend the erection and construction of said building" (the cathedral.) No other consideration appears in the complaint for Olson's agreement to pay plaintiff \$20 per week and one-half the net profits. There is no allegation of the performance of this consideration, except that "plaintiff and defendant entered upon the erection and construction of said cathedral and the performance of said contract," and that the building was completed. It is urged that this made the complaint insufficient. It is very doubtful whether this would be a sufficient allegation of performance if the action were in the nature of assumpsit on the contract between plaintiff and defendant for damages, but it shows part performance at least; this is an action for an accounting; mutual dealings such as are alleged entitle plaintiff to that and part performance does the same. *Eyster v. Parrot*, 83 Ill. 517. Therefore an allegation of full performance was not necessary against a demurrer.

10. The cathedral contract between the plaintiff and defendant provided for payment of one-half the profits to plaintiff, if his services were "faithfully and satisfactorily performed," and that, should he fail to perform them "diligently, faithfully and satisfactorily to the architect" the

\$20 per week should be his only compensation. Before the referee the defendant offered to show that plaintiff's work had not been done to the satisfaction of the architect and that he had been guilty of drunkenness, neglect and other misconduct on the job, to the detriment thereof and to the damage of the defendant. An objection to this evidence was sustained on the ground that there was no issue of performance *vel non*, that plaintiff had not alleged performance nor had defendant pleaded non-performance.

Apart from any question of pleading we think that defendant had waived the misconduct of plaintiff and his failure of performance, so far as they might constitute a complete forfeiture of one-half the profits, because during and after such misconduct, he had paid plaintiff on account more than the \$20 per week, had continued the employment, and, after the completion of the building, had presented an account allowing plaintiff something on account of the profits. *Eyster v. Parrott*, 83 Ill. 517; *Smith v. Alker*, 102 N. Y. 87, 5 N. E. 791; *Haden v. Coleman*, 73 N. Y. 569; *Murray v. Farthing*, 6 Mo. 251; *Westfield Church v. Brown*, 29 Barb. 335; *Hobart v. Beers*, 26 Kan. 329, and other cases, 9 Cyc. 646. Therefore there was no forfeiture. By the same reasoning we must say that the question of satisfaction of the architect was waived.

But plaintiff is asking relief of a court of equity; he must do equity. It is not equitable that he should recover the full one-half if he did not fully perform, nor if his misconduct in respect to the work caused defendant damage. To recover the full one-half he must show full performance. If he has but partly performed he can have what his services were worth but no more. *Eyster v. Parrott*, *supra*.

Plaintiff argues that the evidence shows that he did fully perform, but that does not justify the exclusion of evidence to the contrary, and such exclusion was error. "In good conscience, appellant ought to pay what the work actually done, in the manner and at the time it was done, was reasonably worth to appellant, taking the contract

price for the rate at which to value the work done.”
Eyster v. Parrott, supra.

11. The court sustained the referee's denial to defendant of leave to amend his pleadings by alleging the non-performance and misconduct of plaintiff. This was right. The purpose of the proposed amendment was to forfeit all plaintiff's interest in the profits. Equity will not favor such severity. The rule is that equity will never enforce a forfeiture.

We regret to prolong this interminable case. We shall not order it reversed, however, but direct that without delay it be re-referred to the referee to take evidence and immediately make findings of fact and conclusions of law on the question only whether the plaintiff was guilty of neglect or misconduct in the performance of his agreement with defendant and, if he was, to what extent such misbehavior ought to reduce his share of the profits, and then, if necessary, let the judgment be modified accordingly.

In part affirmed and in part remanded for further proceedings.

Garrigues, C. J. and Scott, J. concur.

No. 9464.

MILLAGE v. IRWIN.

1. REAL ESTATE BROKER—*Right to Compensation.* The broker who produces the purchaser, and is the procuring cause of the sale is entitled to the commission, even though the sale is in fact accomplished by another. Defendant listed his land for sale with plaintiff, and with another, at a price lower than that named to plaintiff, one Richardson. Richardson sold the land to a purchaser whom plaintiff had brought to the country and to whom he had exhibited the land, and who would have purchased from him, but for the lower price named to Richardson. Plaintiff was entitled to his commission.

- 2 INSTRUCTIONS—*Construed*. An instruction the plaintiff was entitled to recover if his failure to consummate the sale was "due to the act of defendant," approved.
3. TRIAL—*Matters Not in Issue*. Real estate broker suing for an agreed commission, the *quantum meruit* is not involved.

Error to Phillips District Court, Hon. Haslett P. Burke, Judge.

Mr. CLAUDE D. WALROD, Mr. W. W. GARWOOD and Mr. OMAR E. GARWOOD, for plaintiff in error.

Messrs. MUNSON & MUNSON, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action brought by W. L. Irwin, a real estate broker, against R. J. Millage, to recover an agent's compensation, alleged to be due to plaintiff as the result of circumstances surrounding the purchase, by one William Meusborn, of a tract of land which the defendant, Millage, had listed for sale with the plaintiff, Irwin. A verdict was rendered, and a judgment entered, in favor of the plaintiff. The defendant brings the cause here upon writ of error.

The principal contention of the plaintiff in error, defendant below, is to the effect that the judgment, or any judgment for the plaintiff, is not warranted by the facts existing in this case. The principal facts which are determinative of this cause are not in dispute, but the controversy is in relation to the rule or rules of law which should be applied in deciding whether or not the plaintiff is entitled to an agent's commission or compensation.

On September 18, 1916, the defendant listed his land with the plaintiff by a memorandum, in writing, as follows: "Holyoke, Colo., Sept. 18, 1916. I have this day listed with W. L. Irwin my half section east half of 19-7-44 at twenty-nine net to me terms as can be agreed upon with March 1, 1917, settlement. R. J. Millage." It further appears that at the times herein mentioned, the defendant

also had his land listed for sale with another agent, one J. G. Richardson. The plaintiff did not consummate a sale with any prospective purchaser, but some time in December, 1916, Meusborn purchased the land through the agent Richardson.

The mere fact, however, that the sale was made by the agent Richardson, is not sufficient to preclude the plaintiff's right to recover. It is the broker who first produces a customer and is the procuring cause of the sale who is entitled to the commission. 9 C. J. 616. In other words, the compensation belongs to that agent "whose efforts were the primary, proximate and procuring cause of the deal negotiated." 4 R. C. L. 319, sec. 57; *Beougher v. Clark*, 81 Kan. 250, 106 Pac. 39, 27 L. R. A. (N. S.) 198. This principle has been recognized in this state, and applied, in *Witherbee v. Walker*, 42 Colo. 1, 93 Pac. 1118; *Williams v. Bishop*, 11 Colo. App. 378, 53 Pac. 239.

It was the plaintiff, and not the agent Richardson, who first showed the defendant's land to the purchaser in question. Furthermore, the evidence shows that Muesborn came from his home in Cedar Rapids, Nebraska, to Holyoke, Colorado, for the purpose of purchasing land, not in any degree as the result of any efforts made by Richardson, but to some extent came in consequence of the efforts of the plaintiff, working in conjunction with one Van Wormer, a real estate agent of Bladen, Nebraska. Some time in October, 1916, Van Wormer, it was testified by plaintiff, "brought out two auto loads of men" to Holyoke, Colorado, and among these men was Meusborn. It was on that occasion that Muesborn first saw the defendant's property, being taken to it by the plaintiff.

Some time in December, 1916, and on a Saturday, Meusborn again came to Holyoke, this time by rail, and was met at the train by the plaintiff. As to showing defendant's property to Meusborn on this occasion, the plaintiff testified: "I went and got my car and showed them (Meusborn and another) all around out west here, and then came to Mr. Millage's (the defendant's) place and

showed them that place and dug a hole in about two or three feet until they was satisfied with the soil and said it was fine and just what they wanted and just the distance from town and they liked it fine." On the Saturday in question, it was agreed by and between the plaintiff and the defendant that the plaintiff should price the land to Meusborn at \$30 per acre, and plaintiff did so. There is no evidence that Meusborn was dissatisfied with such price, or that he expressed an unwillingness to deal at that figure. On the evening of that same Saturday, the plaintiff introduced Meusborn to the defendant, the vendor of the land, and the defendant himself priced the land to Meusborn at \$30 per acre. Meusborn would not buy that evening because, as plaintiff testified, he first wanted to see what is referred to in the testimony as "the Amherst country." All of the occurrences above mentioned were before Meusborn met the agent Richardson. After this time, and probably on the following Monday, Meusborn met Richardson, and purchased the land from him at \$28.50 per acre. Meusborn testified that the only reason why he did not buy defendant's land from the plaintiff agent was because he was able to obtain the property "cheaper from the other party," Richardson.

There is no evidence whatever in the record that the sale could not have been consummated by the plaintiff, at \$30 per acre, if Meusborn, the prospective purchaser, had only the plaintiff as the agent with whom to deal, and had not met and subsequently negotiated with another agent of the defendant. On the other hand, the evidence fairly shows that until Meusborn met the agent Richardson, he continued to have under consideration the purchase of the defendant's land through the plaintiff at \$30 per acre.

The facts above recited are analogous to those existing in the case of *Williams v. Bishop, supra*, and under the reasoning of our Court of Appeals in that case, when applied to the facts in the instant case, the plaintiff should be deemed to be the procuring cause of the sale, and, for that reason, entitled to his commission.

While the instructions to the jury do not expressly state that the plaintiff is entitled to recover only in the event that he is or was the procuring cause of the sale, the instructions as given are equally as fair to the defendant. The instructions are to the effect that the plaintiff is entitled to recover if the failure of the purchaser to deal or consummate the sale with the plaintiff was due to "the act of the defendant." Under such instructions the evidence amply warrants a verdict for the plaintiff. In *Idelson v. Robinson*, 27 Colo. App. 508, 150 Pac. 322, it was said: "The defendants rely, * * * that, when real property is placed in the hands of rival agents, the seller is only liable to the one who consummates the sale, there being no exclusive agency. This is a true proposition of law, if the seller remains neutral as to the rival agents, and gives each of them an equal opportunity to bring the parties together and consummate the sale."

The defendant listed his property with the plaintiff at \$29.00 net to defendant, and expressly authorized the plaintiff to price the land at \$30 per acre. At the same time the defendant had the property listed at \$28, net, with "other agents", among whom was Richardson. The defendant was not, therefore, neutral between the plaintiff and the agent Richardson. It is held, in effect, in *Bellis v. Hann* (Tex. Civ. App.), 157 S. W. 427, that giving one agent a less figure at which to sell property than that given to another agent, is an interference in favor of the one agent to the disadvantage of the other.

The verdict and judgment, so far as the same find the plaintiff entitled to compensation, are undoubtedly correct. In 4 R. C. L. 320, sec. 57, the rule applicable to the facts existing in this case is stated as follows: "Where a prospective purchaser has been introduced to the owner by one broker and the negotiations are pending and have not fallen through, the owner cannot, with knowledge of the facts, complete the purchase with another agent, and avoid his liability for the commission due to the first broker. Thus the law will not permit one broker who has been in-

trusted with the sale of land, and is working with a customer whom he has found, to be deprived of his commission by another agent stepping in and selling to the customer for a price less than the first broker is empowered to receive." The reason for the rule is stated in *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104, the court saying that were it "otherwise, any real estate agent who had borne the burden and heat of the day in working up a sale might have his reward snatched from him at the eleventh hour by his principal empowering some one else to sell at a smaller price."

The jury fixed the amount of plaintiff's recovery at \$320. The defendant now contends that "neither complaint, evidence or instructions afford any basis for arriving at such amount, either upon the theory of quantum meruit or otherwise." There was no error in the amount of the verdict. The pleadings and the evidence show that a sale by the plaintiff was to net the defendant \$29 per acre, and that while negotiations were pending between the plaintiff and Meusborn the defendant agreed that the land should be priced to Meusborn at \$30 per acre. The defendant evidently understood that this additional \$1 per acre was for commissions, or compensation to be paid to the plaintiff, since the defendant testified that he named the price at \$30 per acre because the plaintiff requested it. The defendant says: "He (the plaintiff) wanted me to price it thirty dollars because he had to protect another commission." The action was for an agreed commission, and there was therefore no necessity for pleading or evidence upon the "theory of quantum meruit."

We find no reversible error in the record, and the judgment is, therefore, affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9512.

CITY AND COUNTY OF DENVER v. HATTER.

MUNICIPAL CORPORATION—*Sidewalk.* In actions against municipal corporations for personal injury attributable to defects in the public walk, each case must, as to the character of the defect, be governed by its own circumstances.

There was a space of eight or nine inches in the walk which was unpaved. The flagging beyond this space was higher than the uncovered space, of from an inch to an inch and a quarter. Plaintiff, passing in the evening before the lighting of the street lamps, caught her foot on the exposed edge of the flagging, and suffered a fall with attendant injury. *Held* the case was properly left to the jury. *Pueblo v. Smith*, 57 Colo. 500, distinguished.

Error to Denver District Court, Hon. A. Watson McHendrie, Judge.

Department One.

Mr. JAMES A. MARSH and Mr. JACOB J. LIEBERMAN, for plaintiff in error.

Mr. HENRY E. MAY, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error sued the city for personal injuries resulting from her fall over an obstruction in the sidewalk and had judgment.

It appears that something more than a year prior to the accident a part of the sidewalk on Colfax Avenue, between Pennsylvania Street and Pearl Street, had been relaid in concrete, and that from the end of the new walk to the old flagging there was a space of eight or nine inches wide on which there was no walk. The flagging was, according to the evidence, from an inch and a quarter to two and a half inches higher than said uncovered space. Plaintiff caught her foot on the exposed edge of flagging and fell down, thus receiving the injuries for which she seeks damages. The fall occurred in the evening after dark, the nearby street lamps not being, at the time, lighted.

The city contends that the court erred in not granting a motion for a non-suit, and in refusing certain requested instructions. As to the first proposition, it is said that the projection of the flagging, above the level of the walk west of it, was so small that the court should have held it not such a defect as the city was required to correct; in other words, the walk was reasonably safe, and that there was, therefore, nothing to submit to the jury.

It is evident that each case must be determined on the facts in evidence, there being no general rule which may be applied to all cases. If the facts are such that reasonable men might properly draw different inferences therefrom, it is a case for the jury.

Counsel urge that the case is governed by the ruling in *Pueblo v. Smith*, 57 Colo. 500, 143 Pac. 281, but we do not agree with that contention. There Smith was riding a bicycle on the driveway of a viaduct, on which new plank-ing had recently been laid, the planks running lengthwise of the roadway. Smith was turning from the street car tracks when his wheel struck the raised edges of one of the planks, and he was thrown down. It does not appear what was the height of the obstruction which caused Smith's fall, the only statement in the opinion being that the unevenness in the floor, where the planks came together, varied from a quarter to three quarters of an inch. Such defects would clearly not be regarded as dangerous in a driveway. Persons could not reasonably differ on that proposition.

Here the unevenness is not only much greater, but it is in a sidewalk. The facts are such that the court was justified in submitting the question of negligence to the jury. The instruction given fully covered the case and the court did not err in refusing the requested instructions.

The judgment is accordingly affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9479.

KEELER v. RUSSUM.

STATUTE—Construction. Sec. 7274 of the Revised Statutes which prohibits the examination of husband or wife against the other should be so construed as to work no injustice, if susceptible of such construction.

Action by husband against an alleged seducer for the alienation of the wife's affections.

The wife testified that prior to meeting the defendant she had, because of the ill conduct of plaintiff, entirely lost her regard for him.

Letters of plaintiff to the wife admitting his misconduct, and praying forgiveness, were offered on behalf of defendant, and objected to as inadmissible under the statute.

Considering that the state of mind of the wife towards the husband was directly in issue, that affection on her part was a pre-requisite to injury by its loss, and that to permit the husband to recover damages upon the mere presumption that wives entertain affection for the husband, denying material evidence to the contrary would be subversive of justice. *Held* that the letters were admissible, and that to exclude them was error.

Error to Denver District Court, Hon. Harry S. Class, Judge.

Mr. PHILIP W. MOTHERSILL, Mr. CLARENCE E. WAMPLER and Mr. N. WALTER DIXON, for plaintiff in error.

Mr. ROBERT W. DUNN, Mr. EDWARD C. STIMSON, Mr. JAMES A. ORR and Mr. MARTIN M. BURNS, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE defendant in error brought suit against the plaintiff in error for damages for the alienation of the affection of plaintiff's wife. The complaint was in the usual form, alleging marriage and that the defendant had, by his arts and wiles, destroyed the affection which the wife had for

the husband and deprived him of her society, etc. The plaintiff had judgment in the sum of \$20,000. The cause is now here for review on error.

On the trial, the defendant offered in evidence two letters from the plaintiff to his wife, each of which contained statements tending to confirm the testimony of the wife, given on the trial, that, prior to her meeting with the defendant, she had, because of the ill-conduct of the plaintiff, wholly lost her affection for him. The letters admit that plaintiff was to blame for the wife's loss of affection, and express a desire that he might be forgiven, and be permitted to make the attempt to recover his wife's love. The letters were excluded by the court upon the theory that they were inadmissible under section 7274, R. S. 1908. Said section reads as follows: "A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

Counsel have cited numerous cases upon the question of the admissibility of these letters, but in our view of the case, it is not necessary to determine whether, according to the weight of authority, such letters would be admissible generally, and under another state of facts. There is another and more satisfactory ground upon which it is claimed these letters were admissible. The plaintiff, in order to sustain his cause of action, was required to establish the fact of marriage, and that he had been injured by the defendant's alienation of the wife's affections. That such affection existed was, of course, a prerequisite to a showing of injury by its loss. The state of mind of his wife as related to him was therefore a matter directly in issue. To permit him to recover damages upon the mere presumption of the law that husbands and wives enter-

tain affection for each other, by denying material evidence to the contrary, would be subversive of justice. The statute in question, if open to construction, should be construed so as to work no injustice, if it is susceptible of that construction. *Sexton v. Sexton*, 129 Ia. 487, 105 N. W. 314, 2 L. R. A. (N. S.) 708.

The statute prohibits merely the *examination* of either husband or wife as to any communication made by one to the other during the marriage. To extend this prohibition to the exclusion of communications themselves, is to give it a liberal construction, and thus prevent the ascertainment of the truth as to a material issue in the case. The authorities are to the effect that the statute should be strictly construed, because the tendency of the privilege is to prevent the full disclosure of the truth. *Satterlee v. Bliss*, 36 Calif. 508; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Gower v. Emery*, 18 Me. 82. There is abundant authority for holding that under the circumstances of this case the letters were admissible. *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. 98; *Horner v. Yance*, 93 Wis. 352, 67 N. W. 720; *Sexton v. Sexton*, *supra*; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485. This last is a case in which the husband sued for the alienation of his wife's affections, precisely as in this case, except that he did not allege seduction. It was there held that a letter from his wife, prior to the alleged acts of alienation, showing affection for him, was admissible in evidence. In Vol. 1, Greenleaf on Evidence, sec. 102, it is said: "Thus, in actions for criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence. But, to guard against the abuse of this rule, it has been held, that, before the letters of the wife can be received, it must be proved that they were written prior to any misconduct on her part, and

when there existed no ground for imputing collusion.
* * *

This text is supported by numerous cases in England, some of them running back for more than a century. These letters meet the conditions above stated, and the court committed prejudicial error in excluding them. As the case must be reversed for this reason, it is unnecessary to discuss the other errors assigned.

The judgment is reversed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9518.

GORDON ET AL. v. DENVER ALFALFA MILLING & PRODUCTS
COMPANY.

1. CONTRACT—*Construed.* Adamson agreed to deliver and defendant to buy "all hay grading No. 2 or better grown or growing" upon certain described lands. Adamson was the owner of the hay and it was in stacks upon the lands mentioned. *Held* that no title passed until the hay was graded and accepted by defendant. A subsequent mortgagee of Adamson has the better right. The mortgagee having assumed possession contracted to sell it and defendant to buy it, at a specified price per ton. Defendant was liable for the price so agreed upon notwithstanding his prior contract with Adamson.
2. PLEADINGS—*Construed.* The answer alleging that defendant "at all times has been willing to pay plaintiff the contract price specified in its contract with Adamson." *Held* an admission that plaintiff had title under the mortgage.

Error to Prowers District Court, Hon. A. Watson Mc-Hendrie, Judge.

Department One.

Mr. M. G. SAUNDERS and Mr. E. F. CHAMBERS, for plaintiffs in error.

Mr. GRANBY HILLYER and Mr. D. B. KINKAID, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFFS in error brought suit against the defendant in error to recover what they alleged to be the purchase price of a quantity of alfalfa. They claimed to have had title to the hay from the taking of possession thereof, under and in accordance with the terms of a chattel mortgage upon it, and with the consent of the mortgagor.

They allege in the complaint, that, after having thus taken possession of the hay, their agent was authorized to sell it to the highest bidder for cash; that the defendant company's bid was accepted, and the hay delivered to it.

The defendant presented an affirmative defense to the effect that it had "entered into a certain contract with one Earl Adamson for the purchase of certain hay, then and there owned by the said Adamson, in stack upon, etc., under the terms of which contract defendant agreed to buy, and Adamson agreed to deliver, all hay grading No. 2 or better, grown or growing upon the above described land for the season of 1916," then stating the prices, etc.

The answer further alleges that the plaintiffs took the chattel mortgage in question with full knowledge of the existence of the said contract. There were some further matters alleged, which are not necessary to consider. On a trial to the court, defendant had judgment.

From the record it appears that, in December, 1916, the plaintiffs, to whom Adamson was largely indebted, secured from him a chattel mortgage upon the hay in question; that it appearing that horses were consuming the hay, and that the defendant was hauling some of it away, plaintiffs, by direction of the mortgagor, took possession of the hay through an agent, one Sundin. Sundin, by direction of the plaintiffs, applied to the defendant and other alfalfa buyers for bids on the hay. The defendant bid \$13 a ton, which bid was accepted, and it received the hay. It offered to pay for the hay at the price named in its contract with Adamson.

The contention of the defendant is that its bid was conditional, that is, it was to pay the price named, on condition that the plaintiffs' agent had a right to sell. It is now contended that the sale was not effective, because the mortgage was inoperative, being, as counsel claim, upon property already sold to the defendant. And second, because if the mortgage were in fact valid, no right had been acquired by plaintiffs under their attempted foreclosure.

The first objection assumes that the contract proved was a sale passing title to the defendant. This assumption is wholly groundless. There is nothing in the language of the contract to justify that conclusion. It is executory and unilateral. No title would pass under that contract until the hay had been graded and accepted by the company. It was not required to take any specific quantity of hay, and no one could tell prior to delivery and acceptance what hay would be treated by the defendant as within the contract. The contract was wholly lacking in words of present sale. Adamson, therefore, was in law, if not in morals, at liberty to dispose of the hay as he saw fit. He is not a party to this suit and the rights of the defendant as to him, if he failed to keep his contract, are not involved.

As to the second objection, it is sufficient to say that the record shows no claim in the trial court that the mortgage, if valid, had not been foreclosed.

The general manager of the defendant company testified that he tried to pay the plaintiffs as mortgagees of the hay. True, he offered to pay only the amount which would be due under the contract with Adamson. The answer alleges that the defendant has been at all times willing to pay the plaintiffs the contract price of said hay as specified in the contract with Adamson. This is an admission that the plaintiffs had title to the hay under the mortgage. The supposed condition, i. e., that the seller had title, was no condition other than that which the law implies on every sale made by a party acting in his own right. The defendant having failed in its affirmative defense, and it being undisputed that it bought the hay at the price claimed by the plaintiffs,

and the plaintiffs having title thereto, it cannot now avoid its obligation.

For these reasons, the judgment is reversed and cause remanded for further proceedings in harmony with the views herein expressed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9493.

MCDANIELS v. GEORGE SELL BAKING & CONFECTIONERY
COMPANY ET AL.

PRACTICE IN ERROR—*Non-Suit*. Evidence sufficient to go to the jury having been submitted by plaintiff a judgment of non-suit was held error and reversed.

*Error to Denver District Court, Hon. Julian H. Moore,
Judge.*

Mr. ROBERT H. KANE, for plaintiff in error.

Messrs. GOUDY, TWITCHELL & BURKHARDT, Mr. FRANK B. GOUDY, Mr. J. A. MARSH and Mr. J. J. LIEBERMAN, for defendants in error.

Mr. Justice Burke delivered the opinion of the court.

PLAINTIFF in error brought this action against defendants in error for damages alleged to have been sustained by the death of her son, Harley McDaniels, ten years of age, who was thrown from his bicycle and killed in one of the alleys of said defendant city. Plaintiff alleged that defendant company, in violation of the city ordinances, had placed obstructions in the alley through which the boy was riding, which obstructions were the proximate cause of his death, and that the defendant city knowingly, carelessly and negligently permitted said obstructions to be so placed and there to remain. At the close of plaintiff's testimony

motions for non-suit were filed by both defendants and sustained by the court, and such further proceedings thereafter had that this cause is now regularly before us for review on error. It is only necessary here to determine whether there was such evidence introduced on behalf of plaintiff as required the submission of this cause to the jury.

No summary of the evidence could serve any good purpose here, or be used as a guide in future litigation. Neither is there occasion for a re-statement of the well established and uncontroverted legal principles which must be applied. It is only necessary to say that we have examined this entire record, including the original bill of exceptions, with great care, and are clearly convinced that there was sufficient evidence introduced in this case to go to the jury, and that the sustaining of the motions for non-suit was error. The judgment is accordingly reversed and the cause remanded.

Garrigues, C. J. and Teller, J. concur.

No. 9528.

CITY AND COUNTY OF DENVER v. ST. JAMES TOURING CAR & TAXICAB COMPANY.

1. **MUNICIPAL CORPORATIONS—*Liability in Respect of Public Works Constructed by it Beyond the Corporate Limits.*** The city of Denver, acting under legislative authority, contributed money to aid in the construction of a public road extending beyond its limits, and its officials having authority in the premises sent employes to assist in such work. They were guilty of negligence, and damage ensued to one using such highway. The municipality was liable.
2. **NEGLIGENCE—*Public Highway.*** An uncompleted bridge in the public highway is left without lights or guards in the night time, and by reason of these conditions an accident occurs to the traveler who is proceeding with due care. Those chargeable with the neglect are liable to the injured party.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. J. A. MARSH and Mr. THOMAS H. GIBSON, for plaintiff in error.

Messrs. BARTELS & BLOOD, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE defendant in error brought suit against the plaintiff in error for damages to one of its automobiles resulting, as it was alleged, from a defect in a highway, which was under the charge of said City of Denver. The complaint alleged that the City of Denver, under the authority of its charter, had entered into a contract with the Colorado Bridge and Construction Company for the construction of a bridge on the Bear Creek road between Denver and one of its mountain parks. It further alleged that the city had negligently left an opening in said road at the end of a newly constructed bridge into which opening one of plaintiff's automobiles was driven in the night time and greatly damaged.

The city's defense was that it was a party to said contract only to the extent that it was bound to furnish a part of the funds necessary for the building of said road; that the work was under the control of the State Highway Commission, which was also a party to the contract.

A verdict for plaintiff was returned in the sum of Four Hundred Forty-two Dollars (\$442.00), upon which judgment was entered. The cause is now here for review.

In the view we take of the case, it will not be necessary to determine precisely what obligation the city assumed in the said contract, or to what extent it may control the building of roads outside of its own limits. It is conceded that the charter authorizes the city to construct and maintain public roads, and to aid in constructing and maintaining them, for the purpose of establishing a system of roads connecting the City and County of Denver with certain public parks. The evidence shows that prior to the accident in question, the bridge company had completed the bridge and

turned it over to the party who was employed, either by the Highway Commission, or the city, or by both, as an inspector.

It is also shown, and not disputed, that on the day prior to the accident, a party of city employes which had been for some time engaged upon the road, began the work of what is called "back filling" at this bridge; that is, they were filling in dirt between the bridge and the end of the highway on either side. This work was under the general supervision of the superintendent of mountain parks, an employe of the City of Denver. He was acting, it appears, under the authority of the Manager of Improvements and Parks, an officer who had general charge of the public improvements and parks of the City of Denver. The action of these officers appears to be a contemporaneous construction of the contract in question. They were acting clearly within their authority, as stated in the charter provision mentioned. That being so, if the city was negligent, it was liable. No question is made as to such negligence. The road was left without obstruction near the bridge, and without lights, and the accident occurred in the night time. Possibly the evidence would have justified a finding of contributory negligence on the part of the driver of the car, but the jury found to the contrary, and we are not at liberty to disturb the finding.

We find no error in the record and the judgment is accordingly affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9494.

GILMORE v. WEISSER.

EVIDENCE—Account. One suing upon an account and failing to file a copy thereof as required by sec. 69 of the code is not entitled to give evidence of his account. A book showing merely the date of a purchase, with the amount charged, with no information as to the thing purchased, is not admissible to prove the account.

*Error to Denver District Court, Hon. A. Watson McHendrie,
Judge.*

Mr. THOMAS WARD, JR. and Mr. W. W. ANDERSON, for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANTS in error sued plaintiff in error on an account for goods, wares and merchandise sold and delivered to him and his family. Defendant filed a motion for a bill of particulars, which was granted. A so-called bill of particulars was filed which gave no statement as to the goods, for which the charges were made, only the date and the amount charged being, in each instance, given. An objection to the sufficiency of the bill having been overruled, defendant answered challenging the sufficiency of the complaint to state a cause of action, and denying any indebtedness. In accordance with section 69 of the Code, R. S. 1908, demand was made upon plaintiffs to file a copy of their account, in default of which plaintiffs would be precluded from giving evidence of said account. Plaintiffs did not comply with this demand. A verdict for the amount claimed was returned and judgment entered thereon.

Several errors are assigned, but it will not be necessary to consider all of them. The principal ground of error argued is in the admission of plaintiffs' books to prove the account, and in the court's holding that the bill of particulars was sufficient, and not excluding evidence because a proper account was not filed. The testimony showed that the ledger entries, which were admitted in evidence, were made from slips from which was copied only the date and the aggregate of the sums charged on the slips. The ledger entries, therefore, showed only the amount charged to the customer, with no information as to kind of goods purchased. The book was no evidence that the charge represented the price of goods purchased for or used by defendant's family. The account should show for what goods the

charge was made, and, not so showing, the book was inadmissible. *Way v. Cross*, 95 Iowa 258, 63 N. W. 691; *Rumsey v. N. Y. & N. J. Co.*, 49 N. J. L., 322, 8 Atl. 290.

The court erred, also, in not holding the plaintiffs precluded from introducing evidence of the account from the fact that they had not complied with the demand for a copy of the account. The statute under which the demand was made is peremptory, and the defendant was entitled to be informed of each item going to make up the aggregate. *Scott v. Frost*, 4 Colo. App. 557.

For the reasons above stated, the judgment is reversed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

Nos. 9552-9553.

SNIDER ET AL. v. BOURQUIN ET AL.

1. CORPORATIONS—*Levy on Stock*. It is not contemplated by the statute that an officer shall determine the ownership of corporate shares, otherwise than by the books of the corporation.

As to creditors no one is an owner of shares unless shown by the books to be such owner.

A sale under execution against one person, of shares standing on the books of the corporation in the name of another, is without effect.

Stock not transferred on the books may be reached by proper proceedings.

2. —*Rights of Pledgee*. Plaintiff received in pledge from an Apartment Company, corporate stock standing on the books of the company in the name of a third person. Defendants having judgments against the apartment company levied upon the shares, caused them to be sold by sheriff, and became the purchasers. Plaintiff, though he had never complied with the statute as to the registration of the pledge (Rev. Stat., sec 870) was allowed to maintain an action to vacate the sale to the defendants.

*Error to Weld District Court, Hon. Robert G. Strong,
Judge.*

Mr. HENRY HOWARD, JR. and Mr. ELBERT C. SMITH, for plaintiffs in error.

Mr. WALTER E. BLISS, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error took from The Ideal Apartment Company, as part security for an indebtedness to him, twenty-two shares of the stock of The Buckers Ditch Company, belonging to said Apartment Company, but standing on the books of the Ditch Company in the name of one Zelders; and four shares of the stock of The Meadow Island Ditch Company, also owned by said Apartment Company, but standing on the books of said last mentioned Ditch Company in the name of Snider, the assignor thereof. Bourquin, more than sixty days after he had received the certificates of stock, all of which were indorsed in blank in the usual form, addressed a communication to the said ditch companies, requesting that the fact that he held said shares of stock as security, be recorded in the corporation books; but did not state, as the statute requires, for what amount the stock had been pledged. While the situation was as above stated, plaintiff in error, Campbell, became the owner of a judgment against said Apartment Company, on which an execution issued, and the stock in the New Buckers Ditch Company was sold by the sheriff, after a levy under sections 3618 to 3628 R. S. 1908, Snider being the purchaser at said sale. In the meantime, Snider had obtained a judgment against the Apartment Company under which he caused the said stock in The Meadow Island Ditch Company to be sold by the sheriff, under the provisions of the above mentioned sections, Campbell being the purchaser at the sale. The suits now under consideration were brought by defendant in error against Campbell and Snider to have his lien on said shares adjudged to be paramount to their claim to said stock. The suits were

consolidated and plaintiff had judgment. The defendants bring the case here on error.

The sole question to be determined is whether or not a levy can be made, under the statute, sections 3618 and 3619, R. S. 1908, upon the right of a holder of a stock certificate which has not been transferred on the books of the corporation.

Section 870, R. S. 1908, provides that: "No transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company according to the provisions of this act, unless it shall have been entered therein" (in the stock book), "as required by this section, within sixty days from the date of such transfer, by an entry showing to and from whom transferred; or, in case of the pledge of any such stock, a memorandum be made upon the books of said company, showing to whom and for what amount the stock has been pledged."

Section 3618 reads as follows: "When any execution or writ of attachment shall be issued against any person being the owner of any shares or stock in any incorporated company, or for whom or to whose use any shares or stock in any incorporated company are held by any person other than such defendant, it shall be the duty of the president, cashier, secretary or chief clerk of such incorporated company, upon the request of the officer having such execution or writ of attachment, to furnish him a certificate under his hand, stating the number of rights or shares which the defendant holds, or which are held in trust for such defendant, or to his use, in the stock of such incorporated company."

Section 3619 provides that: "Any officer, upon obtaining information in the manner provided in the last section, or otherwise, that a defendant in any execution or writ of attachment held by him, owns or holds any rights or shares in the stock of any incorporated company, or that such rights or shares are owned or held by any other person in trust for, or to the use of such defendant, may make a levy of such execution or writ of attachment on such rights or

shares by leaving a true copy of such writ with the president, secretary or chief clerk of such incorporated company, etc.," with a certificate of levy, etc.

Reading these sections together, it is plain that the purpose is to make it possible for an attaching or judgment creditor to reach shares of stock, which were not subject to levy at common law, by following the prescribed procedure. By section 870 a transfer of shares must be entered on the stock book to prevent their being liable for the debts of the person in whose name they stood on said book. The procedure prescribed by the other two sections is intended to reach the interest of the shareholder of record. Of no other right or interest could the officers of the corporation certify. When they had informed the sheriff that a defendant in an execution or attachment owned or held shares, the writ could be executed as the section provided. It could not have been contemplated that the officers should determine the ownership of shares otherwise than by reference to the books. As to creditors no one was an owner of shares, according to section 870, who was not shown by the books so to be. The provision requiring a memorandum of pledged stock shows this fact clearly.

In *Pullen v. Headberg*, 53 Colo. 502, 127 Pac. 954, complaint was made because an officer of a corporation did not certify that stock was owned by a person for whom it was asserted the shareholder of record held as trustee. This court held that the officer was right in certifying ownership in the record shareholder; that he had no right to determine, from evidence outside the company books, who in fact was entitled to the stock. That, we said, was a matter for a court.

The levy and sale in this case did not affect the interest of the defendant in error, and the trial court did not err in finding in his favor. We do not, of course, hold that an interest in stock not transferred on the company's books, may not be reached by proper judicial proceedings.

Chief Justice Garrigues and Mr. Justice Burke concur.

The judgment in each case is affirmed.

Affirmed.

No. 9554.

BAILEY v. ERNY.

1. EXECUTION SALE—*Redemption*. The entire property owned by different co-tenants must be redeemed.
2. —*Effect*. The title remains in the debtor, until the execution of the conveyance pursuant to the sale.

The first purchaser cannot defeat the right of a second judgment creditor to redeem, by payment of the second judgment.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Mr. HENRY HOWARD, JR. and Mr. CHARLES H. REDMOND, for plaintiff in error.

Messrs. ROGERS, ELLIS & JOHNSON and PIERPONT FULLER, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE facts necessary to be considered in this case are as follows:

The Germain Investment Company foreclosed a trust deed on certain real estate of which one Cornish and one Scherrer each owned a half interest, said company becoming the purchaser at the foreclosure sale. After the time for redemption by the debtors had expired, the defendant in error, having a judgment against said Cornish, sued out an execution and placed it in the hands of the plaintiff in error, he being *ex officio* sheriff of the City and County of Denver, for the purpose of redeeming the property sold on foreclosure. Shortly thereafter he tendered to the sheriff the amount required for such redemption, but it was refused on the ground that The Germain Investment Company had, that day, deposited with him a sum of money sufficient to satisfy Erny's judgment. Said sum was thereupon tendered to Erny, and refused by him.

Plaintiff in error argues two questions in this case. It is first contended that Erny, as a judgment creditor, could

redeem only from the sale of the Cornish half interest in the land. We are unable to see, however, that this question concerns plaintiff in error or The Germain Investment Company, the real party here in interest. It may be said, however, that the general rule is that a party must redeem the entire property where it is owned by different persons because a purchaser is not required to accept a partial redemption. Freeman on Executions, sec. 312; Jones on Mortgages, sec. 1063.

It is further contended that Erny was entitled to nothing more than his judgment, and that when the holder of the certificate of purchase tendered him an amount sufficient to pay his judgment and costs, his right of redemption was thereby extinguished. Upon this point it is said that plaintiff in error, the holder of the certificate of purchase, has the right to pay a subsequent judgment creditor, for the purpose of protecting its interest in the property for which it holds such certificate.

To support this contention counsel rely upon *Sutherland v. Long*, 273 Ill. 309, 112 N. E. 620 and *McGowan v. Goldberg*, 281 Ill. 547, 117 N. E. 1045. In the first case cited the judgment creditor, who had started to redeem, consented to receive payment of his debt from the holder of the certificate of purchase. That case, therefore, is not authority here.

In the second case, the appellant, holder of a certificate of purchase, sought to compel the issue to him of a deed upon payment of the judgment held by Goldberg upon which Goldberg had posted redemption money with the sheriff. The court held that McGowan had no right to the deed because the money posted by Goldberg was, under the statutes of Illinois, a binding bid at the coming sale to the extent of the redemption money posted by him. The quotations made from the opinion by counsel to support their contention are merely *dicta*. The writer of the opinion stated, it is true, that had Goldberg not already posted the money, McGowan's right to pay off the judgment would have been plain. This was no part of the decision, and

not required by the facts. No one can say what the other judges of the court would have held upon the state of facts here presented. This *dictum* is the more peculiar because it ignores well settled rules of law in Illinois. Beginning with the case of *Phillips v. Demoss*, 14 Ill. 410, the supreme court of that state has, through a number of decisions, held that the holder of a certificate of purchase on an execution sale, acquired by the purchase no title to the land, either legal or equitable, but merely the alternative right to receive the redemption money, in case of a redemption, or a deed for the land after the time for redemption had expired. That is to say, the holder of the certificate had no such interest in the property as would entitle him to pay off a subsequent judgment without the consent of the judgment creditor.

In *Phillips v. Demoss*, *supra*, the court, by Judge Caton, speaking of the purchaser at an execution sale, said: "When he purchased, knowing that he must either get his purchase money back again, with ten per cent upon it, within fifteen months, or get the land, he was aware that others, and not himself, had the right to say which he should take. This was the alternative character of his investment. * * * The statute holds out no inducements for a speculation at a sheriff's sale beyond ten per cent for the use of the purchase money, and the purchaser can set up no equitable claim beyond that, where the redemption is made according to the provisions of the statute."

The contention of counsel that the Investment Company had such an interest in the property as to entitle it to pay off the judgment without the consent of the judgment creditor, is not sustained, even by the authorities cited on that point. In this state the title remains in the judgment debtor until a deed is made according to the terms of the law, that is, after the time for redemption has expired. *Manning v. Strehlow*, 11 Colo. 457, 18 Pac. 625. And that is the rule in other jurisdictions. *Turner v. Sawyer*, 150 U. S. 578, 37 L. Ed. 1189, 14 Sup. Ct. 192. A purchaser's interest is not subject to levy and sale prior to the expira-

tion of the period for redemption. *Bowman v. People*, 82 Ill. 246, 25 Am. Rep. 316.

The right of redemption is given by statute, and the holder of a certificate of purchase has, in our opinion, no right to prevent a judgment creditor from exercising his right of redemption if exercised within the statutory period. The Germain Investment Company had no right to preserve its status as a potential owner of the land as against the undoubted right of Erny to redeem. As stated in the quotation from Judge Caton, the redemption law is not intended to induce speculation upon the part of the execution purchasers. The defendant in error, having this right, was entitled to determine for himself whether he would accept payment of his judgment, or redeem the property.

There is no error in the judgment and it is accordingly affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9500.

HOUSTON v. SNYDER.

1. **CONTRACT—*Construed.*** Plaintiff holding contracts from certain parties residing in another state for the delivery by such non-residents of a specified number of lambs, assigned it to defendant, in consideration of defendant's written agreement to pay "a cent a pound on lambs that are delivered to me" by the parties contracting to make the delivery. In fact no lambs were ever delivered, nor were the parties to the original contract with plaintiff, able to make delivery. *Held* that no lambs having ever been delivered to the defendant, plaintiff was not entitled to an action against him.
2. **VOLUNTARY PAYMENT—*When May Be Recovered.*** Money voluntarily paid under no mistake of fact, and without fraud or imposition upon the one making the payment, cannot be recovered; e. g. where under a contract by which he is only conditionally liable the party with full knowledge of all the facts makes payments upon account of such contract, they cannot be recovered.

*Error to Denver District Court, Hon. Julian H. Moore,
Judge.*

Mr. MERRICK K. EDWARDS and Mr. W. B. MORGAN, for plaintiff in error.

Messrs. ALLEN & WEBSTER, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error was plaintiff below in an action for a claimed balance on a contract with defendant concerning the sale of certain lambs.

The complaint alleges that plaintiff, doing business as The Houston Commission Company, having bought from the firm of Harris & Anderson a large number of lambs, at twelve cents a pound, turned his contract over to the defendant at thirteen and a quarter cents per pound, and permitted him to make a contract for said lambs directly with said firm; that such contract with said firm having been entered into, the defendant induced plaintiff to make his price to defendant thirteen cents a pound, whereupon defendant gave him a memorandum, as follows: "This is to certify that the Houston Commission Company are entitled to a cent per pound on lambs that are delivered to me by Harris & Anderson on a certain contract of this date. W. A. Snyder."

The complaint further alleges that when the time had arrived for the delivery of the lambs under said contract, the defendant, without plaintiff's knowledge, released Harris & Anderson from all obligation under the contract, receiving for such release a large sum of money.

Plaintiff claims a right to recover one cent per pound on 10,000 lambs of the average weight of sixty-five pounds, less \$2,250, already paid to him by defendant.

Defendant, by answer, denied that he owed plaintiff anything, and set up a counterclaim for \$2,250, "loaned" to the plaintiff subsequent to the making of said contract.

The court found for the defendant on plaintiff's claim under the contract, and also for the defendant on the

counterclaim. From a judgment entered on said findings, plaintiff brings error.

We find no basis in the record for the contention of plaintiff in error that his action is upon an oral contract made prior to the delivery of the memorandum set out in the complaint. The pleading indicates that the memorandum expressed a new agreement, following, as it does, the allegation that the defendant had induced the plaintiff, and the plaintiff had consented, to make his price thirteen cents a pound; one cent more than Harris & Anderson were charging for the lambs. He could hardly, in good faith, accept the memorandum from defendant, given to him under those circumstances, and later contend that it did not express the final agreement. Indeed, the plaintiff's testimony is conclusive on the point. When asked, "What did Snyder give you as evidence of the arrangement between you?" he replied, "He gave me a written memornadum signed by himself." The pleading apparently recognizes this view by charging the defendant with having, without plaintiff's consent, excused non-delivery. If his rights did not depend upon the delivery of lambs, he was not concerned with the release. Under some circumstances a release, and consequent prevention of delivery by plaintiff might be material; but it is not so in this case. Plaintiff's compensation or profit was to arise from the delivery of lambs under the contract between defendant and Harris & Anderson. He was not entitled to anything on a delivery to the defendant of lambs which he might make, on his own account. His right was limited to a specified transaction. If Harris & Anderson made no delivery, defendant received no advantage from the turning over to him of plaintiff's option, and plaintiff had no profit. That is clearly in accord with the intention of the parties, and is fair to both.

The evidence establishes the fact that the release of Harris & Anderson was made in good faith. The contract between defendant and Harris & Anderson, to which reference is made in the memorandum contract with plaintiff, provided for the sale of certain lambs contracted for by

Harris & Anderson from specified individuals in Utah. The evidence establishes the fact that these parties could not deliver any lambs under their contract. That one, at least, of the contracts was void because the seller of the lambs never signed nor authorized the signing of it. Harris testified that when he demanded the lambs he discovered that all of such contracts were "fakes".

We, therefore, find no error in the judgment for defendant on plaintiff's cause of action.

The judgment against plaintiff on the counterclaim is manifestly wrong.

The claim made by defendant for money loaned, was not supported by any evidence whatever.

Defendant testified that he "paid" plaintiff \$750 upon his request. A receipt for it, containing the memorandum "Part pay't comsn 10,000 lambs sold." is in evidence. As to the other payments of \$500 and \$1,000, respectively, there is no evidence except that of plaintiff, who testified that nothing was said about a loan.

It is evident that the payments were advances made by defendant on the contract.

We cannot agree with counsel for defendant in error that, when one receives money from one who is under no obligation to pay it, the law implies that he will return it.

This is too broad a statement. In some cases there is such an implication, and in others there is not. "The law is well settled that money voluntarily paid, under no mistake of fact, and without fraud or imposition upon the party paying it, cannot be recovered." *Hollingsworth v. Stone*, 90 Ind. 244.

This court has announced the same rule. In *Lewis v. Hughes*, 12 Colo. 208, at page 212, 20 Pac. 623, it is said: "It is well settled that an action will not lie to recover back money paid voluntarily with a full knowledge of the facts and circumstances." To the same effect is *Steck v. Irrigation Co.*, 4 Colo. App. 323, 35 Pac. 919. See also *Smith v. Schroeder*, 15 Minn. 35; *Dall v. Earle*, 59 N. Y. 638, and *Elliott v. Swartwont*, 10 Peters 137.

The reason of the rule is well stated in *Brisbane v. Dacres*, 5 Taunt. 154, where the English cases are reviewed. Gibbs, J., speaking of a voluntary payment, under no mistake as to the fact, said: "He who receives it has a right to consider it his without dispute; he spends it in confidence that it is his; it would be most mischievous and unjust if he, who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover the money. He who has received it is not in the same condition; he has spent it in the confidence that it was his and perhaps has no means of re-payment."

There was here no mistake as to the facts, which were that there was a contract between plaintiff and defendant under which defendant was only conditionally liable to the plaintiff, and under which his liability would be fixed, in any event, only at a future date. If, under these circumstances, he chose to make payments, they were such as the authorities call voluntary and not recoverable.

The judgment is affirmed as to plaintiff's demand, and reversed as to defendant's counterclaim. The costs in this court will be taxed against plaintiff in error.

Affirmed in Part and Reversed in Part.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9514.

GILLETT v. FLORA.

1. ASSIGNMENT WITHOUT RECOURSE—*Effect*. A mortgage was assigned "with the notes therein described, without recourse in any event." *Held* that though the defendant had previously endorsed the notes, the endorsement and assignment being parts of one transaction, though of different dates, were to be construed together.
2. CONTRACTS—*Construction*. Writings of different date but parts of one transaction are to be taken together.

Retaining the notes of the third party after agreeing to their application as payment amounts to an acceptance of them, as such, and to an acceptance of the parol agreement to apply them upon the debt.*

*Syllabus by Denison, J.

Error to Sedgwick District Court, Hon. H. P. Burke, Judge.

Department Two.

Mr. MYRON L. LEARNED, Mr. GEORGE F. DUNKLEE and Mr. EDWARD V. DUNKLEE, for plaintiff in error.

Messrs. MUNSON & MUNSON, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

THIS was a suit by Flora against Gillett, charging him as endorser of a promissory note. Plaintiff had judgment and defendant brings error.

The note was secured by mortgage, which was purchased together with the note, and was assigned to Flora by Gillett. By the terms of the assignment the mortgage was transferred "together with the notes or obligations therein described without recourse or in any event or for any cause." The assignment and indorsement, being parts of one transaction, are one contract and therefore the indorsement is a qualified one, and the defendant was a mere assignor, not liable as endorser. G. S. 1908, § 4501. *Davis v. Brown*, 94 U. S. 423, 427, 24 L. Ed. 204; *Munro v. King*, 3 Colo. 238, 240.

The plaintiff claims that the assignment of the mortgage was made on the day after the indorsement, and so was not contemporaneous therewith, and that therefore the two are not to be construed as one contract. The exact time is not material. The vital question is whether they were parts of one transaction. On this point plaintiff's own testimony defeats him. He says that at the time he made the deal with Gillett he was to receive the note and mortgage, that he did receive them and recorded the assignment. He says further: "I had been in the habit of getting those"

(meaning assignments of mortgages) "when I transferred and got a mortgage, but they didn't bring it up at the time they brought the mortgage and I asked for it and they brought it later." So it appears that he bought the note and mortgage together, that the sellers delivered the mortgage without an assignment, that according to his custom he asked for the assignment and got it. This makes one transaction. Moreover the assignment itself purports to assign the note as one transaction with the assignment of the mortgage.

Plaintiff claims that when he received the assignment he did not read it, but recorded it without reading and did not know of the clause in question till the defendant pleaded it. He cannot be heard to say that he did not read the assignment or know what it contained. *Jaeger v. Whitsett*, 3 Colo. 105; *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203.

The judgment should be reversed with directions to dismiss the case.

Bailey, J. and Scott, J. concur.

No. 9555.

NORTH AMERICAN UNION v. MONTENIE.

1. ACCORD AND SATISFACTION—*Contract Construed*. Plaintiff was the beneficiary in a benefit certificate issued by a fraternal society to her husband, in the sum of \$2,000.00; but with provision that if insured should die by his own hand only one-half the sum stated would be payable. The husband committed suicide and the society sent to the widow a check for \$1,000.00, on the back of which was a writing to the effect that it was in full settlement of all claims and certificate issued to the husband. The widow accepted and collected the check without any misrepresentation inducing the action. *Held* an accord and satisfaction. *Weber v. Heald Camp, Woodmen*, 60 Colo. 529, distinguished on the ground that by the Act of 1907, Sec. 73, and sec. 4 of c. 139 of the laws of 1911 and sec. 37 of c. 99 of the laws of 1913, the statutory provisions upon which the decision in that case is based were no longer in effect.

2. EVIDENCE—*Presumptions*. Plaintiff having cashed the check after the institution of her suit, it was presumed that she acted under legal advice.

Error to Denver District Court, Hon. H. J. Hersey, Judge.

Messrs. ALLEN & WEBSTER, Mr. DANIEL WENTWORTH and Mr. DAVID B. MALONEY, for plaintiff in error.

Mr. GEORGE P. STEELE, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE plaintiff in error is a fraternal beneficiary society organized under the laws of Illinois and doing business in this state. The defendant in error is the widow of one Fred L. Montenie who, on the 26th day of September, 1907, while a resident of Illinois, became a member of said society and received therefrom a benefit certificate, in the sum of \$2,000.00 in which the defendant in error was named as beneficiary. From the agreed statement of facts it appears that said Fred Montenie committed suicide in this state in January, 1918; that proof of death was duly made and thereafter the said society paid to the defendant in error the sum of \$1,000.00 by check, on the back of which was printed the following: "Received in settlement in full of all claims and demands against the North American Union, inclusive of those growing particularly out of, or incurred by reason of Certificate No. 905 of the North American Union, issued on the life of Fred L. Montenie." It appears further that this check was retained by the defendant in error until the 31st day of October, 1918, when it was collected by the defendant in error from the bank upon which it was drawn.

Defendant in error filed her complaint against said society alleging the holding of said benefit certificate and the making of proof of the death of her husband, and alleging, further, that the defendant refused to pay her the amount named in the certificate or any part thereof, except upon the condition that plaintiff accept from defendant the sum of \$1,000.00 in full of all claims. She demanded judgment for \$2,000.00.

The answer set up the fact that the insured died by his own hand, and that under the terms of the certificate but one-half of the benefit fund was, under those circumstances, payable to the beneficiary. It set up also the payment of the \$1,000.00; the memorandum on the check above stated and the fact that the plaintiff had collected the check after the suit was begun.

The certificate contained a clause which provided that it should be incontestible after two years from its date, and the contention of the defendant in the trial court was that the liability of \$2,000.00 could not be denied. The court found in favor of the plaintiff and entered judgment for \$1,081.75. The defendant below brings error.

In the view that we take of this case, it is not necessary to consider the various errors assigned except as to the effect of the payment and receipt by defendant in error of the \$1,000.00. Plaintiff in error insists that it is, under the circumstances of this case, an accord and satisfaction; while defendant in error contends that the contrary is true under the case of *Weber v. Head Camp, Woodmen*, 60 Colo. 529, 154 Pac. 728.

We are of the opinion that our decision in that case is not controlling under the facts of this case. It was there held that the suicide of the policy holder was no defense to an action on the policy because of the act of 1903 prohibiting such defense. In the opinion it is pointed out that the defense of suicide not being permissible, the amount due upon the policy was a fixed, definite and liquidated sum; that it was not therefore a case where a payment of a sum less than the sum claimed would constitute an accord and satisfaction. The opinion further points out that, when the beneficiary accepted \$1,000.00 upon the statement of the clerk of the camp that she would get that or nothing, she was, according to her testimony, misled, and so acted under a misapprehension for which the defendant company was responsible.

A very different state of facts is here presented. The check with its indorsement in blank to be signed by the

beneficiary was a proposition to receipt the claim of \$2,000.00 for the sum of \$1,000.00. The law approved April 1, 1907, and in force when this certificate was issued, by section 73 specifically exempted fraternal orders from the provisions of the insurance law, which provided that the suicide of a policy holder should not be a defense against the payment of the amount of the policy. This exemption is confirmed by section 4, chapter 139 of the laws of 1911 and by section 37 of chapter 99 of the laws of 1913.

This distinguishes the instant case from the case above cited. In addition, it appears that after the suit was brought and, of course, at a time when there was a dispute as to the amount due plaintiff, plaintiff cashed the check for \$1,000.00, and thereby accepted the terms upon which it was offered, as the same were indorsed upon the back of the check.

In *New York Life Insurance Company v. MacDonald*, 62 Colo. 67, 160 Pac. 193, this court held that, where there was a dispute as to the amount due a party and he signed a receipt on the back of the check, the receipt reading as follows: "Received payment in full as specified on reverse side" the statement on the reverse side being "In full settlement of all claims under policy No. etc.," it was an accord and satisfaction. That case was followed in *Colorado Tent & Awning Co. v. Denver Country Club*, 65 Colo. 418, 176 Pac. 494, and in the very recent case, *Winter Cigar Company v. Berman*, 67 Colo. 487, 186 Pac. 285. See also *C., R. I. & P. Ry. Co. v. Mills*, 18 Colo. App. 8, 69 Pac. 217, where the question is fully discussed; also *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. 556. There is no charge that the defendant in error was induced by misrepresentations to cash the check sent her containing the proposition that it be received in full. As she accepted it after the suit was begun it must be supposed that she accepted under legal advice. The acceptance of the money, not being induced by either fraud or mistake, constituted an accord and satisfaction under the authorities, for which reason the judgment must be reversed.

The judgment is reversed and the suit ordered to be dismissed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

On Petition for Rehearing.

Counsel for defendant in error, in the petition for a rehearing, insists that there is no consideration for the agreement of accord and satisfaction, and that there must be one, aside from the payment. He cites from text books to the effect that such consideration is necessary.

These citations, however, refer wholly to settlements where the claims were liquidated. It is well established that when there is a dispute as to the amount due, the payment of a sum less than that claimed is a sufficient consideration for an accord and satisfaction.

Counsel quote from an opinion of this court as follows: "This court, in a series of cases, has held that the acceptance of a sum less than the claim, with knowledge that it was intended as full payment, is, in the absence, at least, of some protest, *or indication that it was not taken in satisfaction of the claim*, a bar to an action for an alleged balance, when the debt is unliquidated or disputed, there being no fraud or mistake in the case." *New York Life Co. v. McDonald*, 62 Colo. 67, 160 Pac. 193.

The part italicized certainly affords no support to counsel's position. In this case the proof that the payment was taken in satisfaction of the claim is beyond a question; the receipt in terms states it to be so.

Counsel further objects that the sum paid was only the amount conceded to be due. That objection is met by a case on which counsel says he relied in advising the cashing of the check, which had been held for a long time.

In *C., R. I. & P. Ry. Co. v. Mills*, 18 Colo. App. 8, 69 Pac. 317, the court said: "Nor is the settlement affected by the fact that the creditor received only what the debtor concedes to be due, or that he takes the money under protest, still asserting his claim to the balance."

The petition presents no new matter and will therefore be denied.

No. 9540.

DANKWARDT v. KERMODE, ET AL.

1. ATTORNEY'S LIEN—*Effect.* Under Rev. Stat., sec. 242, the employment of an attorney operates as an equitable assignment of the client's right to the extent of the agreed compensation.
2. —*To What Causes of Action Extend.* To actions for malicious prosecution.
3. —*Superior to Any Setoff.* The attorney's lien cannot be defeated by the setoff of a judgment against his client growing out of independent transactions prior to the attorney's employment. *Whitehead v. Jessup*, 7 Colo. App. 460, distinguished.

*Error to Jefferson District Court, Hon. Harry S. Class,
Judge.*

Mr. H. E. LUTHE and Mr. WILLIAM H. DICKSON, for plaintiff in error.

Mr. JOSEPH N. BAXTER and Mr. JOHN T. BOTTOM, *Pro Se.*

Mr. Justice Bailey delivered the opinion of the court.

THE action was by Dankwardt for a decree setting off two judgments which he had theretofore recovered of the defendant, M. Luella Kermode, against a judgment in her favor which she had recovered of him. Also it was sought therein to have the court deny the rights of defendants Bottom and Baxter to assert an attorneys' lien against the judgment secured by Kermode, paramount to Dankwardt's right of set off. Findings and decree were for Bottom and Baxter, and Dankwardt brings the case here for review.

It appears from the admitted facts that Dankwardt recovered a judgment against M. Luella Kermode and others for \$823.29 and costs, on October 30, 1912. That on November 30, 1914, he recovered another judgment against

M. Luella Kermode, for \$416.00 and costs, and that no part of either of such judgments has been paid. That on the 15th of June, 1912, John T. Bottom and Joseph N. Baxter, attorneys, entered into a contract with M. Luella Kermode for services to be rendered in an action to be brought by her against Dankwardt; that they were to receive compensation upon a contingent basis, each to receive one-third of whatever amount was recovered in such suit. After two trials judgment was finally entered in the sum of \$1,000.00 in favor of Kermode and against Dankwardt. The question is whether the attorneys' lien attaches to two-thirds of such judgment, according to agreement, or whether Dankwardt shall be permitted to set off his judgments, as above noted, against the entire judgment, without regard to such claimed lien.

Section 242, R. S. 1908, is the provision on which the claims of Bottom and Baxter are based, and reads as follows: "All attorneys and counselors-at-law, shall have a lien on any money, property, choses in action, or claims and demands in their hands, and on any judgment they may have obtained, or assisted in obtaining, in whole or in part, and on any and all claims and demands in suit, for any fees or balance of fees, due or to become due from any client. And in the case of demands in suit, and in the case of judgments obtained in whole or in part by any attorney, such attorney may file with the clerk of the court wherein such cause is pending, notice of his claim as lienor, setting forth specifically the agreement of compensation between such attorney and his client or clients, which notice, duly entered of record, shall be notice to all persons and to all parties, including the judgment creditor, and all persons in the case against whom a demand exists, and to all persons claiming by, through or under any person having a demand in suit or having obtained a judgment, that the attorney whose appearance is thus entered has a first lien on such demand in suit, or on such judgment for the amount of his fees; but such notice of lien shall not be presented in any manner to the jury in the case in which the same is filed. Such lien may be enforced by the proper civil action."

In *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 344, 3 Am. St. 567, this court, in discussing the effect of the former attorney's lien statute, which is much less comprehensive than the present one, said, at page 231: "Our statute recognizes both the general and special branches of the attorney's lien as it was enforced at the common law; but in some important particulars this lien under the statute is much more complete and satisfactory than it is at the common law. The statutory lien is not limited to costs or to taxable fees. It reaches all fees due for services rendered, whether the amount of such fees has been agreed upon or is to be settled in suit as upon a *quantum meruit*. Nor is it limited to compensation for services rendered by the attorney in procuring the judgment upon which he relies. In this respect it is more comprehensive than the mechanic's lien; it covers a balance legally due him for any and all professional services theretofore rendered his client."

In the case at bar the claimed lien is founded upon a specific contract for fixed compensation. In discussing the effect of such a contract between attorney and client, in *Bell v. Lake County*, 26 Colo. App. 192, 141 Pac. 861, the court, after citing with approval *Terney v. Wilson*, 45 N. J. Law, 282, *Ely v. Cook*, 28 N. Y. 365, and *Williams v. Ingersoll*, 23 Hun. (N. Y.) 284, at page 199 thereof (141 Pac. 864) says: "That a contract between attorney and client for payment of the attorney out of the judgment recovered or to be recovered operates as a binding equitable assignment of that fund *pro tanto*, and creates a lien upon the specific fund, is clearly held in *Terney v. Wilson*, *supra*, citing *Ely v. Cook*, and *Williams v. Ingersoll*, *supra*, and other authorities.

"We think, and hold, that the common law lien created by such an assignment, of which the judgment debtor has notice, is in no wise inferior to the statutory lien of an attorney. Therefore, the status of a judgment debtor who settles the judgment with the judgment creditor, or anyone claiming under him, without regard to the lien of the at-

torney, does so at his peril in either case, and in that respect the principle announced by the authorities as to the statutory lien applies also to the common law." (Citing authorities.)

Under this decision it is clear that when the contract for services was signed by the parties on June 15, 1912, it then and there operated as an equitable assignment by virtue of the attorney's lien statute, of her rights in the demand against Dankwardt, to the extent of giving her attorneys a first lien to the amount of their agreed compensation upon any judgment which she might recover thereon. There is nothing in the nature of an action for malicious prosecution which prevents it from being the subject of equitable assignment under the attorney's lien statute. In *Miller v. Houston*, 27 Colo. App. 89, 146 Pac. 786, it was declared: "It is quite true, at common law, that all torts which are not injuries to property are not generally assignable. However, our statute gives to attorneys a lien on all claims and demands in suit and a lien upon all judgments obtained for any fees or balance of fees due or to become due from any client. * * * There is nothing in the statute indicating a purpose of the legislature to exclude causes of action for personal injuries from the lien act. There is every reason why such causes of action should be included therein."

In determining the question whether the right of set off shall be permitted to defeat an attorney's lien the Supreme Court of Wisconsin in *Stanley v. Bouck*, 107 Wis. 225, 83 N. W. 298, said: "An application to the court to set-off one judgment against another is addressed to the sound discretion of a court of equity, whether made by motion or action, and when the judgments are rendered in actions having no connection with each other, it will not be allowed as against an attorney's equitable lien for services and disbursements, where evident injustice will be done."

In *Rice v. Day*, 33 Neb. 204, 49 N. W. 1128, it is said: "Whatever the rule may be in other states, it is well settled in this state that the lien of an attorney upon a judg-

ment to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the suit, or to any set-off."

In addition to our own decisions the case of *Harlan et al. v. Bennet et al.*, 127 Ky. 572, 106 S. W. 287, 32 Ky. L. Rep. 473, 128 Am. St. 360, is also a clear and definite holding that an attorney's lien attaches at the time of the commencement of services. And the following decisions held that an attorney's lien cannot be defeated by any right of set-off of judgments thereafter recovered, growing out of prior independent transactions: *Bucki & Son v. Atlantic L. Co.*, 128 Fed. 332, 63 C. C. A. 62; *Finney v. Gallup et al.*, 2 Neb. Unof. 480, 89 N. W. 276; *Barry v. Third Avenue R. Co.*, 87 App. Div. 543, 84 N. Y. Supp. 830; *Carter v. Davis*, 8 Florida 183; *Roberts v. Mitchell*, 94 Tenn. 277, 29 S. W. 5, 29 L. R. A. 705; and *Hroch v. Aultman*, 3 S. D. 477, 54 N. W. 269.

Plaintiff in error bases his right to set-off chiefly upon the authority of *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042, which was a suit in equity for the offset of mutual judgments. Williams was attorney for Jessup in litigation between Jessup and Whitehead out of which the mutual judgments grew. Williams did not attempt to assert an attorney's lien. The case, therefore, turned upon the right of the judgment creditor to set off his judgment against an assignee. This decision simply invokes the familiar rule that the assignee of a chose in action takes it subject to all defenses which might have been pleaded against it in the hands of the original owner, and has no application to this case. That the Court of Appeals had no intention to apply the rule announced in that case to actions involving the attorney's lien statute is made manifest from the express terms of the opinion itself, wherein at page 467, the court says: "But the question of the effect of an attorney's lien is not before us. Williams never took the steps necessary to make his lien effective. He abandoned it by taking an assignment of the judgment to himself, and is now claiming, not a right to a certain

amount out of the judgment in payment for his services, but the absolute ownership of the entire judgment. He has relinquished whatever equities he might have been entitled to by virtue of his lien, and his position in this proceeding is simply that of assignee."

Upon the authority of Colorado decisions it seems settled that under our attorney's lien statute a contract between attorney and client operates at once as a binding assignment of so much of the demand as might be necessary to discharge the attorney's claim.

That the Kermode claim against Dankwardt was unliquidated is an additional reason why the attorney's lien should, in equity and good conscience, prevail as against the right of set-off, as it was only through their professional skill and efforts that the demand finally became of any settled and definite value at all, and which otherwise might have been absolutely worthless. The attorney's contract was entered into, and the assignment of the fund thereby effected before the judgments relied upon by plaintiff in error as set offs were obtained. The conclusion reached is based wholly upon, and must therefore be limited to, the facts of this particular case, as shown upon the record.

Plaintiff has cited authorities from other jurisdictions to support his contention, but in so far as they are in conflict with previous decisions of this court and of our Court of Appeals, may well be disregarded. It is also to be noted that one of the early New York cases cited to support plaintiff's contention rests wholly upon English decisions and the common law, and the other New York case so relied upon was based upon a statute different from the one here involved. The more recent decisions in that jurisdiction, based upon an attorney's lien statute substantially like our own, are in complete accord with the views herein expressed.

The judgment of the trial court is right, and should be affirmed.

Judgment affirmed.

Mr. Justice Scott and Mr. Justice Denison concur.

No. 9575.

THE PEOPLE EX REL. v. NATIONAL SURETY COMPANY.

BOND OF EXECUTRIX—*Liability of Surety.* A surety company which was surety on the bond of an executrix having failed, the defendant, another surety company, agreed with the first to fulfill all its obligations under the bonds hereby assumed, and pay all valid claims arising under said bonds in accordance with the terms and conditions thereof. *Held* an action upon the bond by the administrator of the estate, appointed after the removal of the executrix, might be maintained against defendant for an indebtedness of the executrix to the estate.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. ROBERT H. KANE, for plaintiffs in error.

Messrs. DANA, BLOUNT & SILVERSTEIN, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS case was determined upon a general demurrer to the amended complaint of the plaintiffs in error, plaintiffs below. The demurrer was sustained, and the plaintiffs elected to stand upon their complaint. Judgment was rendered for the defendant, the National Surety Company.

The amended complaint alleged that one Ozetta Marshall was the duly qualified executrix of the estate of Dillie S. Aldrich, deceased, pending in the County Court of the City and County of Denver; that in compliance with the order of the County Court, the said executrix entered into a bond in the sum of \$3,500.00 with the United Surety Company, conditioned upon the faithful performance of her duties as such executrix; that on or about the 13th day of January, 1911, the said United Surety Company failed or went into voluntary liquidation, and that at such time, the said United Surety Company entered into a written contract and agreement with the Empire Surety Company, whereby, for a valuable consideration, the latter company promised and agreed to and did become liable upon the said bond, and to

assume and pay all obligations, debts and losses which might accrue or become payable upon said bond to the full extent thereof, and that by said agreement the said Empire State Surety Company became entitled to have and collect the future premiums to become due and payable by said executrix upon said bond.

It is further alleged that on the 18th day of September, 1912, the said Empire State Surety Company either failed or went into voluntary liquidation, and on said date, "the said Empire State Surety Company and the National Surety Company, the defendant herein, entered into a written contract and agreement whereby the said National Surety Company promised and agreed to take over the surety business, to-wit, the surety bonds upon which the said Empire State Surety Company was liable in the State of Colorado, among which was the bond and obligation of the said executrix in the said estate of Dillie S. Aldrich, deceased, and to assume and become liable upon the said bond of said executrix, and to assume and pay all obligations, debts and losses which might accrue or become payable upon said bond of said executrix in the event of the default of the said Ozetta Marshall as said executrix, to the full amount of \$3,500.00; that thereupon the said National Surety Company became entitled to have and collect the future premiums to become due and payable by said executrix upon said bond; that a full, true and complete copy of said written contract and agreement, together with that list or bordereau embracing the memorandum of the said bond of the said executrix hereinbefore described and referred to, duly certified to by the office of Commissioner of Insurance of the State of New York is hereto attached, marked "Exhibit B", and to which reference is hereby made for greater information and particularity."

It is also alleged that "as a part of the consideration for which the said National Surety Company promised and agreed to and with the Empire State Surety Company to assume and agree to pay any indebtedness or loss that might accrue because of the default of said executrix, the

said National Surety Company proceeded to collect and did collect the future premiums upon said bonds which the said executrix was bound and obligated to pay."

It is then alleged that on the 3rd day of September, 1913, the defendant, the National Surety Company, filed its petition in the County Court, asking that it be discharged from liability on said bond because of failure of the executrix to pay to it the premiums due on said bond, which petition in language admits its liability on the bond sued on. A copy of this petition is embodied in the complaint.

It is further alleged that the defendant failed to prosecute said petition to be released, because of the payment of such defaulted premiums by the executrix, which defendant accepted.

Further, that the County Court, on the 26th day of April, 1918, ordered the said executrix to make an accounting and settlement of the matters and things involved in the said estate and to report the amount in her hands for distribution; further, that on the 20th day of May, 1918, the court found the executrix to be in default and adjudged her to be indebted to the estate in the sum of \$4,171.32, and ordered said sum to be distributed; that the executrix failed to comply with such order and for such reason the court removed such executrix, and thereupon the plaintiff in error, Robert H. Kane, was duly appointed and qualified as executor.

The complaint alleges demand and refusal to pay upon the part of the defaulting executrix.

There seems to be but one contention of the defendant in error that requires consideration. The contract of the defendant in error with the Empire State Surety Company is set out in full as an exhibit, and made a part of the complaint. The contention is that the contract is a strict reinsurance agreement, one for indemnity only with the Empire Company, and the original assured has no right of action against the reinsurer.

To sustain this contention, the defendant in error relies chiefly upon the case of *Allemannia Fire Insurance Co. v.*

Fireman's Insurance Co., 209 U. S. 326, 52 L. Ed. 815, 28 Sup. Ct. 544, 14 Ann. Cas. 948.

From a careful study of that case we are not able to see how or in what way the contention of the defendant in error receives support. The action in that case was by the original insurer company to recover from the reinsuring company certain losses. The original insurer was insolvent and had not paid the losses and it was contended that the action would not lie under a contract of reinsurance until such losses had been paid by the reinsured company. It was held that: "The liability of the reinsurer is not affected by the insolvency of the reinsured company or by the inability of the latter to fulfill its own contracts with the original insured; and in this case the compact, notwithstanding it refers to losses paid, will be construed to cover losses payable by the reinsured company; and, in a suit by the receiver of that company on the compact, the fact of its insolvency and non-payment of the risks reinsured does not constitute a defense."

The doctrine of reinsurance as there announced may not be questioned. It is contended here that the contract before us is one of strict reinsurance and must be so treated. But a contract of such character, whatever it may be termed, must be construed in the light of its provisions, whatever be its designation, as in the case of any other contract.

As was said in *Goodrich and Hicks Appeal*, 109 Penn. St. 530: "The proper significance of these terms would, of course, vary with the clearly manifested intentions of the parties."

While the contract of the National Surety Company, defendant, with the Empire State Surety Company does contract and "agree to repay to the Empire State Surety Company", yet by the terms of such contract, the National Surety Company further agrees: "To fulfill all the obligations of the Empire State Surety Company under the bonds and policies hereby reinsured against loss as above stated, * * * and to pay as aforesaid, all valid claims

arising as aforesaid under said bonds and policies in accordance with their terms and conditions occurring after August 22, 1912, at 4 o'clock p. m."

And again: "The Empire State Surety Company hereby transfers to the National Surety Company all its rights, interests, powers and privileges under all such bonds and policies so that the National Surety Company may act thereon in all respects as if it had itself issued such bonds and such policies."

And further: "It being the intention of this agreement that the National Surety Company shall take the place of the Empire State Surety Company as to all such unexpired bonds and all such unexpired policies in all respects with regard to all obligations therein and for loss thereunder."

In these provisions of the contract will be found an express promise to pay all valid obligations of the Empire State Surety Company under the bonds and policies reinsured in accordance with their terms and provisions, and it is expressly declared to be the intention of the National Surety Company to take the place of the Empire State Surety Company as to all such, in regard to all obligations therein and for losses thereunder.

In such case the insured may sue the reinsurer directly, and his right of action against the reinsured is merely cumulative.

It was said in *Barnes v. Hekla Fire Insurance Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. 458: "It will be conceded that the agreement between the two companies set out in the answer is not merely a contract of reinsurance, but also to pay, and to assume the payment of, losses of parties indemnified by policies issued by the defendant company reinsured. Reinsurance is a mere contract of indemnity, in which an insurer reinsures risks in another company. In such a contract the policy holders have no concern, are not the parties for whose benefit the contract of reinsurance is made, and they cannot, therefore, sue thereon. But the agreement alleged in this case is not a mere reinsurance of the risks by the reinsurer, but it embraces also an

express agreement to assume and pay losses of the policy holder, and is therefore an agreement upon which he is entitled to maintain an action directly against the reinsurer. *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414."

See also *Ruohs v. Ins. Co.*, 111 Tenn. 405, 78 S. W. 85, 102 Am. St. 790, 57 Am. Rep. 249, *Glen et al. v. Hope Mutual Ins. Co.*, 56 N. Y. 379.

We think that the complaint sufficiently states a cause of action against the defendant. The judgment is reversed with instructions to proceed in accordance with the views herein expressed.

Reversed.

Garrigues, C. J. and Denison, J. concur.

No. 9544.

HENRYLYN IRRIGATION DISTRICT ET AL. v. HOWARD.

MANDAMUS—Pleading. The petition for mandamus to compel payment of matured coupons of an irrigation district must show a previous demand upon the officers of the district.

Error to Weld District Court, Hon. George H. Bradfield, Judge.

Mr. JOHN R. SMITH, Mr. H. B. WOODS and Mr. W. E. BLISS, for plaintiffs in error.

Mr. HENRY HOWARD, JR., *Pro Se.*

Mr. Justice Scott delivered the opinion of the court.

THIS is an action in mandamus by the defendant in error, Henry Howard, Jr., to compel the plaintiffs in error, The Board of County Commissioners of Weld County, and the County Treasurer of said county, ex-officio treasurer of the Irrigation District to pay certain matured interest coupons of bonds issued by the District. Howard appears to be the owner of but a portion of the bond issue.

A demurrer to the alternative writ by the defendants was overruled by the court. The defendants below elected to stand on their demurrer and the alternative writ was made permanent. The defendant brings error.

The plaintiffs in error make two contentions: First, that the owner of only a portion of the outstanding bonds may not properly bring the action. This contention was denied in the case of *Henrylyn Irrigation District v. Thomas*, 66 Colo. 300, 181 Pac. 980.

Second, that the writ does not show that a demand was first made upon the defendant's officers. This contention was upheld by this court in *Henrylyn Irrigation District v. Thomas*, 66 Colo. 296, 181 Pac. 979, and for such reason, the judgment of the District Court is reversed, with permission to the plaintiff below to amend his pleadings.

Judgment reversed with instructions.

Bailey and Denison, JJ., concur.

No. 9560.

WEIR v. COLORADO MORTGAGE & INVESTMENT COMPANY, LTD.

PRACTICE IN ERROR—*Finding Upon Sufficient Evidence*, will not be disturbed.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Mr. JAMES P. WILSON, Mr. ANDREW WHITEHEAD and Mr. EDWIN N. BURDICK, for plaintiff in error.

Messrs. PONSFORD, CARNINE & KAVANAUGH, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is a suit for specific performance. The complaint alleges that in May, 1918, "the plaintiff and defendant entered into an agreement whereby the plaintiff agreed to buy, and the defendant agreed to sell" certain real estate,

and that thereafter the defendant "refused and still refuses to carry out and execute the said agreement." The answer denies these allegations, and for a further defense pleads facts showing that the alleged contract "was not and is not in writing," and is within the statute of frauds. These allegations are denied in the replication.

Upon trial the court found "in favor of the defendant, upon all of the issues." Judgment for defendant, and plaintiff brings error.

There is sufficient evidence to support the finding in favor of the defendant upon the issue of whether or not any agreement had been entered into between the parties, and, therefore, sufficient evidence to support the judgment. We find no error in the record. The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9595.

BOND-CONNELL SHEEP & WOOL COMPANY v. SNYDER.

1. **PARTNERSHIP**—Parties may form a partnership without intending it. Plaintiff and defendant entered into a contract for the purchase and sale of lambs; defendant to furnish the money necessary to be advanced upon the purchase, and plaintiff to conduct the purchases and sales. Each to share in the profits, and be liable for the losses, in specified proportions. *Held* a partnership.
2. **CONTRACT**—*Waiver of Contract Provision.* A contract for purchase and sale of live stock, one party to advance the money and the other to conduct the business, provides that the parties should "advise and counsel with each other and furnish all information regarding transactions agreed upon." Plaintiff, the one conducting the purchases and sales, made several purchases without consulting with his partner. As to some of these defendant accepted and settled therefor, without complaint. There was no suggestion of fraud in any of the transactions. *Held* that defendant was not permitted to waive the provisions of the contract in one instance and insist upon them in others.

3. **INTEREST**—*When Allowed.* In the settlement of a partnership interest may be charged against one partner upon advances which he has agreed to make and as to which he had failed.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Messrs. LINDSEY & LARWILL and Mr. ROSS BRAY, for plaintiff in error.

Messrs. MELVILLE & MELVILLE and Mr. E. M. WALTON, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THE action was one by W. A. Snyder, for an accounting under a contract with the Bond-Connell Sheep & Wool Company, involving the purchase of sheep and lambs in New Mexico, and resale thereof by Snyder at Denver. Plaintiff had judgment in the sum of \$39,497.11, which is now here for review.

It is contended that the contract is one of agency, and not a co-partnership. In any event all of the matters between the parties have been settled except three items, and that as to them the plaintiff ignored the contract in that he acted without consulting or notifying defendant, as by the terms of the contract he was bound to do, and that the transactions, for this reason, resulted in a loss instead of a profit; that as to such particular transactions plaintiff was acting for himself, and not for the defendant.

It appears that for several years the parties had been buying and selling sheep and lambs in New Mexico. The contract for the year 1917, and the one here involved, provides that Snyder is "to participate in the profits derived from all purchases, sales and disposals of such lambs, feeder ewes and wethers, to the extent of one-fifth of the total net profits, and to share in all losses occurring from the sale of such lambs, feeder ewes and wethers, to the extent of one-fifth of the total net losses."

The contract further provides as follows: "It is further expressly agreed that the said W. A. Snyder, party of the

second part, shall participate on the above and foregoing basis, in all sales of lambs, feeder ewes and wethers, made by the party of the first part, except such lambs, ewes and wethers shipped to their own feed yard during the existence of this contract. It is further agreed and understood this agreement and arrangement has no reference to and does not apply on purchase of breeding ewes.

"It is hereby further agreed that the party of the second part includes in this agreement all purchases made by him in the State of New Mexico originating south of the town of Springer in Colfax County on the A. T. & S. F. Railroad, excepting the Chris Otto Lambs, etc., which the party of the second part reserves the privilege of handling exclusively himself."

"The parties of the first part agree to furnish all monies required as advance on purchases. The party of the second part to remit them full advances paid by purchasers on sales as sales are made."

"Both parties to this agreement agree to advise and counsel with each other and furnish all information regarding transactions agreed upon under the terms of this contract. It is hereby understood and agreed further that this contract shall remain in full force and effect during the year 1917."

Under this contract sheep and lambs aggregating in value approximately one million dollars were purchased and sold concerning which there is no dispute. In addition the plaintiff made deals known as the Van Houton, Corona and Ancho deals, which the defendant alleges were not handled according to the contract, but which it nevertheless accepted. The items in dispute are designated by the parties as the International, the Garcia and the Culp deals, all of which defendant repudiated as not within the terms of the contract. The reasons for such action are that Snyder had not advised or counseled with defendant in reference to these particular transactions, had not remitted the advances received by him in respect thereto, that the Culp and International deal was made on his own account, and

the Garcia either for his own account or for the account of some other person unknown to defendant. It was further alleged that plaintiff at no time treated the items in question as falling within the contract. This was denied, and the court found all facts disputed in favor of plaintiff.

The trial court in construing the contract, determined that it was not one of agency, as contended by defendant, but of partnership, and that as to its conditions it was entire and not severable. In discussing the effect of contracts like the one under consideration, in *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mr. Justice Cooley said: "It is nevertheless possible for parties to intend no partnership, and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or even that they expressly declare that they are not to be partners. The law must declare what is the legal import of their agreement, and names go for nothing when the substance of the arrangement shows them to be inapplicable."

Partnership has been defined in 30 Cyc. 349, as follows: "The definition of a partnership which seems to be the most accurate and comprehensive is that of Chancellor Kent, as follows: 'A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions.'"

It plainly appears from the contract that the parties had an actual interest in all sheep handled under it, in the respective proportions of one-fifth and four-fifths, and that they were to share jointly in the ownership, possession, profits and losses. It is not disputed by plaintiff that the contract is one of co-partnership, but even if both denied the intent to assume such relation, the denial could not avail. In *Richardson v. Kelley*, 58 Colo. 47, 142 Pac. 171, at page 57, speaking of a like point, this court said: "It is sometimes said that, in order to constitute a partnership, the parties must have intended to assume that relation

towards each other. But by this it is meant to say that they must have intended to make such stipulation as in law constitutes a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as a matter of law. It certainly cannot be meant to say that, when the parties have entered into an agreement which contains all the incidents of a partnership, the mere unexpressed mental apprehension of its effects will control the legal consequences."

Upon the whole record, considered in connection with the express provisions of the contract it is apparent that the relation between the parties was that of a partnership, not of agency. It is an entire contract as by its terms it contemplates that each and all of its parts, material provisions and considerations, are interdependent and common each to the other. 13 C. J. 561. The contract covers all of the business for the year 1917, and provides for the sharing of the profits and the losses in all transactions for that period. Any other construction would permit the parties to choose which, if any, of the several transactions between them should be subject to the contract, and this might, in effect, completely nullify the agreement. The trial court was eminently right in holding, as matter of law, that the purchases under the contract were not separable, and that the instrument did not give the right to the defendant to repudiate one purchase or series of purchases, and accept another or others.

It was also found, as a matter of fact, that several purchases were made without advising and consulting with the defendant. It was also found that in some of the instances where this was done the defendant accepted and settled for the transactions without complaint. As to these transactions the court held that the stipulation as to the consultation and advice was not vital, and that defendant should not be permitted to waive the provision in one instance and insist upon its enforcement in others. The court also definitely found that there was no element of fraud in the transactions complained of, and we are of

opinion that, under the circumstances of the case, the holding as to the materiality of the provisions for advice and consultation was not error.

It is vigorously contended by defendant that the court erred in refusing to make certain findings as tendered by it, and this refusal is assigned as prejudicial error. Inasmuch as the trial was to the court, and all the issues were found in favor of plaintiff, this point is not well taken, as there was abundant competent evidence, which, if believed and accepted by the court, as evidently was done, to support its findings, and this court upon a full canvass of the testimony is clearly of opinion that the findings of the trial court could not have well been otherwise.

The method adopted by the trial court in computing interest upon the sum involved is also assigned as error. Under the terms of the contract the defendant agreed to advance the purchase price of all stock bought. This was later changed by defendant, and defendant paid the grower, mailed purchasers checks to plaintiff, and then drew on plaintiff for the total sale price. Whenever a transaction showed a loss the plaintiff was drawn upon by defendant for the purchase price, and the loss was carried by plaintiff. In view of the fact that the findings upon all of the issues were for plaintiff, the method of computing interest appears to be eminently fair and equitable, as it is computed only upon advances made by Snyder to the general business, which advances under the contract it was incumbent upon the defendant to make.

After a careful examination of the entire record, and a consideration of all of the assignments of error in relation thereto, nothing appears which either calls for or would warrant a reversal of the judgment.

Judgment affirmed.

No. 9563.

**BARTHOLOMEW v. EMERSON-BRANTINGHAM IMPLEMENT
COMPANY.**

1. PRACTICE IN ERROR—*Matter Not Pledged*, but treated by both parties as in issue will be considered in the court of review.
2. PAYMENT—*Need Not Be in Money*. Whatever is given and accepted as a discharge of liability is payment, e. g., an agreement at the time of the execution of a promissory note, to apply thereon the notes of another which the payee has before that obtained from the maker.
3. PRINCIPAL AND AGENT—*Agent's Authority*. B. was employed by by plaintiff to settle or compromise a claim which he asserted against another. There being no limitation upon his authority it was assumed to authorize a stipulation for the application upon the promissory notes received in the settlement, as a payment, the notes of another, before that received by the plaintiff from defendant. Retaining the notes of the third party, after agreeing to their application as payment, amounts to an acceptance, and the parol modification of the notes upon which they are to be applied.

*Error to Denver District Court, Hon. Clarence J. Morley,
Judge.*

Department Two.

Mr. GEORGE F. DUNKLEE and Mr. EDWARD V. DUNKLEE,
for plaintiff in error.

Mr. FRANK L. GRANT, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

THE suit was by defendant in error, plaintiff below, on promissory notes. The answer denied non-payment, averred payment and denied all allegations not admitted. There was no replication; consequently the plea of payment stands admitted in the pleadings.

This court has wavered on the question but has finally determined that payment is an affirmative defense, even when it is negated in the complaint and the answer con-

tains a general denial. *Nitro Co. v. Kearns*, 50 Colo. 1, 9, 114 Pac. 396; *Harvey v. D. & R. G. R. Co.*, 44 Colo. 258, 262, 99 Pac. 31, 130 Am. St. 120; *Florence O. & R. Co. v. Bank*, 38 Colo. 120, 122, 88 Pac. 182; *Thomas v. Carey*, 26 Colo. 485, 495, 58 Pac. 1093. Since, however, payment was treated by both parties and the court as an issue, and the question is not raised here, we shall not reverse the case on that point, but shall consider the case as if the plea of payment had been traversed. The District Court directed a verdict for the plaintiff for the full amount of his claim.

1. The plaintiff company claims that the facts shown by the evidence do not constitute payment, and so, since payment is the only issue, are irrelevant.

The evidence was that in 1909 defendant wrote to Reeves & Company, saying he would buy a new 20 h. p. engine, if they would send a man along to fix up the deal on the old engine, and help make a partnership settlement with defendant's partner, Ong. They sent one Spicer. Upon the settlement Ong owed defendant \$600, and defendant arranged with Spicer to buy a new engine, giving notes for the price, and endorsing the two \$300 notes given by Ong in settlement of the partnership matters, as partial payment of the notes so given. This was done and Spicer took all the notes, and the Ong notes were accepted and retained by Reeves & Co. That later the notes were held by plaintiff and one Bryson appeared, claiming to be the agent of plaintiff and threatened proceedings unless new notes were given. Defendant claimed that the Ong notes should be credited and Bryson agreed that they "should be a payment on the new notes." Thereupon new notes, that is the notes now in suit, were given.

Payment has been defined variously. 30 Cyc. 1180. It may be defined as the discharge of indebtedness by delivery of money or its equivalent to the creditor. It must be intended as whole or partial discharge by both parties. If defendant's testimony was true the Ong notes were to be applied as a partial discharge of the notes in suit. Payment need not be in money; that is payment which the

parties agree is given and accepted as payment. 30 Cyc. 1181, note 6. *Richards v. Stewart*, 53 Colo. 205, 124 Pac. 740. The fact that the agreement to apply the Ong notes as payment was made at the time of making the notes in suit is not enough to exclude it as a defense. *Richards v. Stewart*, *supra*. The agreement shown by defendant's testimony is sufficient, then, to constitute payment.

2. But defendant in error says Bryson's authority is not shown. He is shown to be the agent of defendant in error to settle or compromise with Bartholomew by the acceptance of the notes in suit which he procured for the plaintiff company. Being, then, agent for that purpose, and no limitation of his authority within that scope being shown in the record, we are compelled to assume that the contract which he made with Bartholomew was authorized.

3. It follows from what has been said that the plaintiff company, upon the record before us, is shown to have accepted the Ong notes as part payment. It retained them after it had contracted that they should constitute payment. This, unexplained, amounts to acceptance and the parol modification of the notes, if it be a modification, is, therefore, on the face of this record, an executed one and not open to the objection that it varies a written instrument. *Richards v. Stewart*, *supra*.

It is impossible to say what will be shown upon a new trial, but, upon the evidence before us, the defendant, if he was not entitled to a directed verdict, had at least a right to have the question of the truth of his testimony passed on by the jury. The judgment should be reversed and a new trial granted, with leave to both parties to amend.

Garrigues, C. J. and Scott, J. concur.

No. 9612.

MONTEZ v. GEORGE.

1. **PRINCIPAL AND AGENT—*Agent's Authority.*** The landlord "gave the tenant to understand" that he was represented by his son Eusebio, or that the son "did business for him." *Held* too vague to determine the authority of the son.

The direction of the landlord to the tenant "when I am not here pay Eusebio," confers no authority upon the latter to eject the tenant.

In spite of the evidence of the alleged ejectment the landlord was held entitled to a directed verdict for the rent to the end of the term.

2. — *General Agent*, may not go outside of the usual course of the business in his charge.

Error to Huerfano District Court, Hon. A. F. Hollenbeck, Judge.

Department Two.

Mr. CHARLES HAYDEN, for plaintiff in error.

Mr. ROMILLY FOOTE, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

THE plaintiff brought suit for rent. Verdict and judgment for defendant.

Plaintiff, Montez, executed a lease to defendant, George, of a store and hotel in Walsenburg for three years from June 15, 1915, at \$100 per month, payable monthly in advance on the 15th of each month. The day of payment was afterwards changed by oral agreement to the first of each month. Defendant paid to June 30, 1917, when he quit. August 13, 1917, plaintiff brought suit for balance of rent, \$1,150, alleging that defendant had abandoned the premises, refused to pay more rent and had declared his intention to abandon and to pay no more. These allegations were denied.

The defendant pleaded five separate defenses. The second defense was that July 8th or 10th, 1917, plaintiff forcibly evicted defendant. The replication denied all the defenses. After the evidence was all in the court withdrew from the jury all the defenses but the second. No cross error is assigned, and, if it were, we think the ruling was correct.

The evidence of the eviction consisted only of testimony that about July 8th, 1917, one Eusebio Montez, adopted son of plaintiff, took possession of the demised premises and excluded the defendant who went there and attempted to enter. Defendant also testified that plaintiff "gave me to understand that when he was not present Eusebio represented him in his business or Eusebio done business for him," and "he told me on one occasion, when I am not here you can pay Eusebio."

The foregoing is the only evidence of Eusebio's authority, and it manifestly discloses no authority in him to evict the plaintiff's tenants or to abrogate a lease. The words "when I am not here you can pay Eusebio" confer no authority except to receive money. The words "that when he was not present Eusebio represented him in his business or Eusebio done business for him" are too vague to determine Eusebio's authority. Being stated in the alternative they amount to no more than a statement that Eusebio sometimes did business for the plaintiff.

Since no special authority to evict is shown and since we do not know where plaintiff was at the time of the supposed eviction because there was no competent evidence of the whereabouts of plaintiff at the time of the alleged eviction, we must assume, in order to impute the necessary authority to sustain defendant's case, that these words imputed to Eusebio power to evict plaintiff's tenant whenever plaintiff was out of sight and hearing. They are not sufficient to do it. Even a general agent may not go outside of the usual course of the business in his charge. *Willard v. Mellor*, 19 Colo. 534, 537, 36 Pac. 148.

The plaintiff moved for a directed verdict for \$1,150. We think that for the reasons above stated the motion should have been granted. There were numerous other errors but what has been said makes it unnecessary to notice them.

The case will be reversed with directions to enter judgment for the plaintiff for eleven hundred and fifty dollars.

Garrigues, C. J. and Scott, J. concur.

No. 9577.

HOOVER ET AL. v. THE PEOPLE.

1. INTOXICATING LIQUORS—*Statute Construed.* Libel under the Act of 1915 as amended by c. 82 of the Acts of 1917. No search warrant being in the hands of the officer at the time of the seizure of the liquors held that the proceeding could not have been under sec. 11 and 12 of the act. Sec. 12 can be made to apply only to things seized under a warrant issued pursuant to sec. 11.
 2. *Forfeiture.* The seizure without warrant of a vehicle being used for the carriage of liquors, is justified only under section 13, and the vehicle cannot therefore be declared forfeit.
- A statute like that in question will not be construed to forfeit the property of an innocent person unless this result is unavoidable. Such a penalty must be expressed in unambiguous terms.
- Sec. 20 will not be construed to authorize destruction of the property of an innocent person used unlawfully by another, without the owner's consent or knowledge, for the unlawful carriage of intoxicating liquors.

Error to Adams County Court, Hon. W. C. Hood, Jr., Judge.

En Banc.

Mr. HARRY S. CLASS and Mr. M. B. WALDRON, for plaintiffs in error.

Hon. VICTOR E. KEYES, Attorney General, Mr. CHARLES ROACH, Deputy Attorney General, and H. C. RIDDLE, for The People.

Mr. Justice Denison delivered the opinion of the court.

THIS was an information in the name of the People, in the nature of a libel under the initiated statute of November 5, 1918, to declare forfeit certain whisky and the automobile in which it was captured. The facts before this court are agreed on.

The plaintiffs in error, George Hoover and M. H. Richards, were partners operating a garage, automobile livery and taxicab business in Denver. They employed a number of chauffeurs, and owned and used the machine in question in that business. Ethel May Richards, plaintiff in error, and intervenor below, was a *bona fide* mortgagee of said automobile. Neither she nor Richards nor Hoover knew that it was used to carry liquor, or had any notice or knowledge sufficient to put them on inquiry. Richards and Hoover instructed "all their drivers not to use *the car* for transporting intoxicating liquor in any way."

In the early morning of January 28th, 1919, one James Midgett, a chauffeur in the employ of Richards and Hoover, was driving said automobile in Adams County, carrying therein fifty-seven cartons of whisky. He was pursued by the sheriff and *posse*, was fired on and wounded. He then abandoned the car, escaped and has never been apprehended. The officers were acting without a warrant.

February 17th, 1919, this proceeding was begun. Plaintiff in error, Ethel May Richards, intervened, claiming under her chattel mortgage. No question was raised as to the forfeiture of the whisky, but Richards and Hoover contested the forfeiture of the automobile on the ground that they were *bona fide* owners, and innocent of any wrong. The court declared the automobile forfeited. The case is brought here on error, and the question we are asked to determine is, whether the interest of a wholly innocent person in a vehicle used for the unlawful transportation of intoxicating liquor is forfeited because of such unlawful use? Under the present facts there can be no forfeiture. The procedure, if valid at all, must be so under chapter 98 of the Session Laws of 1915 as amended by chapter 82 of

the Session Laws of 1917, and chapter 141, S. L. 1919, the last being the so-called "Bone Dry Act" initiated and passed by the people in November, 1918. The sections particularly referred to are known as the Search and Seizure sections—Sec. 11 of the Act of 1915, as amended in 1917 (S. L. 1917, 285-6-7), Sec. 12 of that Act as amended in S. L. 1919, pp. 484-5, Sec. 13 (S. L. 1919, pp. 465-466) and Sec. 20 (S. L. 1919, p. 467). Said sections are as follows: "Section 11. Search and Seizure.—If any person make an affidavit before any Justice * * * or Judge * * * stating that he has reason to and does believe that intoxicating liquors are being * * * kept * * * or carried in violation of this act * * * and describing in said affidavit the premises, wagon, automobile * * * or device to be searched, then such justice or judge * * * shall issue a warrant to any officer which the complainant may designate * * * commanding such officer to search the premises * * * automobile * * * or device described in such affidavit. * * * The officer charged with the execution of said warrant may * * * break open any premises * * * automobile * * * or device, * * * which by said warrant he is directed to search; and may execute said warrant any hour of the day or night."

This section then prescribes the form of warrant, which requires the officer to search the designated premises and bring before the judge any liquor which may be found in such search, and the vehicle which carried it.

"Sec. 12. Duty of Officer.—If any intoxicating liquors are *there found*, said officer shall seize the same and the vessels in which they are contained * * * and any * * * automobiles * * * or device used in conveying same, and then safely keep and make immediate return on such warrant. *Such* property shall not be taken from the custody of any officer seizing or holding the same, by writ of replevin or other process, while the *proceedings relating thereto* are pending. Final judgment of *conviction in such proceedings* shall be a bar to any and all suits for

the recovery of any *such* property so seized, or the value of the same, or for damages alleged to arise by reason of *such* seizure and detention. The judgment entered shall find said liquor to be unlawful and shall direct its destruction forthwith. * * * *The said * * * automobile * * * or device * * * shall likewise be ordered disposed of as personal property is sold under execution and the proceeds therefrom applied, first, in the payment of the costs of the prosecution and of any fine imposed, and the balance, if any, paid into the general school fund of the county in which such conviction is had.* * * * The officer serving the warrant shall forthwith file a complaint in the court issuing same, charging such violation of law as the evidence in the case justifies. If such officer refuses or neglects to file such complaint, then the person filing the affidavit for the search warrant, or any other person, may file such complaint. * * *

Sec. 13. Officers Search.—Any sheriff, * * * or any other officer or person authorized by this act, having personal knowledge or reasonable information that intoxicating liquors are being kept in violation of law in any place * * * shall search such suspected place without a warrant, and without any affidavit being filed, and if such officer or person finds upon the premises intoxicating liquors, he shall seize the same together with the vessels in which they are contained * * * and any * * * automobile * * * or device used in conveying said liquors or kept for the purpose of violating any of the provisions of this act, and arrest any person or persons in charge of such place, or aiding in any manner in carrying on the business conducted in such place, and shall take such person, or persons, with the liquors * * * automobile * * * or device, so seized, forthwith, or as soon as convenient, before a justice of the peace or judge of any court in the county in which such seizure is made having jurisdiction * * * and without delay make and file a complaint for such violation of law as the evidence justifies. It shall be lawful for officers in executing the duties imposed

upon them by this section to break open doors or enclosures for the purpose of obtaining possession of such intoxicating liquors."

"Sec. 20. No Property Rights.—There shall be no property rights of any kind whatsoever in any liquors, vessels, appliances, * * * automobiles, * * * or devices used in or kept for the purpose of violating any of the provisions of this Act."

We find no provision for forfeiture unless it be that sentence of section 12 which we have italicized, or section 20, which we have quoted. No search warrant was in the hands of the sheriff at the time of the seizure. It follows that the proceedings could not have been under sections 11 and 12. Section 12 applies only to thing seized under a search warrant issued under section 11. It cannot be made to apply to any other property. Such a statute will not be construed to forfeit property of an innocent person unless such construction is unavoidable. *Shawnee N. Bank v. U. S.*, 249 Fed. 583, 161 C. C. A. 509.

The seizure of the automobile in question, since it was without the warrant required by section 12, can be justified only under section 13; but under this section there is no provision for forfeiture. There is, perhaps, reason why there should not be, because search and seizure without warrant is a harsher and more drastic proceeding than with warrant and it may be that it was desired and intended for that reason to make the penalty less severe. Be that as it may, however, we cannot add the penalty of forfeiture to a statute. Such a penalty must be expressed in distinct terms. Here it is not expressed at all.

But counsel for the people say that, since section 20 provides that there shall be no property in an automobile used in violating this act, the plaintiffs in error, when it appeared that the automobile was so used, had no more claim upon it than any one else, and, if we understand their argument correctly, they claim that therefore, even though the proceedings in the court below were wholly unauthorized, the plaintiffs in error cannot complain. This presents the only

question in the case which we find difficult: Does section 20 destroy the property of an innocent proprietor in a thing used unlawfully in connection with intoxicating liquor? It is true that the literal terms of this section will, if carried out, have that effect, but we are not so to construe a statute if such construction is avoidable, (*Shawnee N. Bank v. U. S.*, 249 Fed. 583, 161 C. C. A. 509), and if we give the terms their literal effect, without limitation, we find it almost incredible that they could have been so intended.

It should be borne in mind that the property here sought to be confiscated by forfeiture is in itself lawful property and not obnoxious in any way to the criminal laws of the state.

If property, not itself obnoxious to the statute, is forfeited by reason of use in violation of the statute without the owner's knowledge or consent, we must say that if a thief steals an automobile and carries whisky in it the owner loses title thereto. If a thief with a bottle of whisky in his pocket steals an automobile and drives away with it the owner loses title thereto. Is it claimed that there is a distinction between use by a thief and use by one who comes lawfully into possession of the automobile? That distinction does not appear in section 20. The literal construction of that section includes use by a thief as well as by any one else. But if we suppose that the question of the thief is out of the case; still the literal meaning of the section would destroy property in an automobile used to transport liquor unlawfully against the owner's will or without his knowledge. That is the case before us now! The chauffeur was forbidden to carry intoxicating liquor. If section 20 is to be construed literally, I forfeit title to my automobile if I overtake, on the road, a man with a bottle of whisky in his pocket, invite him to ride and he accepts the invitation. He is using my automobile to transport whisky unlawfully.—I have not consented to it and do not know it—but if the people are right in this case, that will not avail me. The logical consequence is, that if he pushes me out of the automobile and drives on with it he may be liable for assault but not

for larceny nor in replevin, trover or trespass *de bonis*, because the automobile, after I lose property in it, is as much his as mine. If a passenger on a street car or the railroad has whisky in his suit case or pocket, the car and engine no longer belong to the railroad company and the company can maintain no action based on title thereto. Is this result absurd? It surely is; but it is a conclusion inevitable from the argument that is put before us in this case. The lawful innocent owners are to be deprived of property in an automobile because some one, without their knowledge or consent, carried liquor in it, and this court is asked to say that they have no right in that automobile which the law is bound to respect. That would be exactly the condition in the cases above supposed. Under the literal terms of this section the machine is not a subject of property, and, since there is no provision that it be forfeited to the State, it can never again belong to anybody.

Considerations of this sort have led to the abolition of deodands, either by statute or otherwise, in England and most of the States of the Union; in none of them is the common law enforced.

Congress so amended the law against the importation of intoxicating liquor into Oklahoma as to expressly say that the vehicle should be forfeited "whether used by the owner thereof or other persons." Why was not section 20 made as certain as that? Would the people have passed this act if it had been so expressed as to plainly tell them that under it the owner of any vehicle of any kind in which liquor happened to be transported, even without his knowledge or consent, *ipso facto* forfeited all his title thereto?

The conclusion is that there must be some modification of the literal terms of section 20. See *Aggers v. People*, 20 Colo. 348, 38 Pac. 386.

Where then shall we stop, in reducing the literal scope of this section? It must be that the intention of section 20 was to destroy the proprietary interest of the violators of the law, including accessories before and after the fact—e. g., all who loan their property for a violation of the act or

permit or connive at such use of it, but not the interest of wholly innocent proprietors. *Camp v. Rogers*, 44 Conn. 291.

The case of *Dobbins v. U. S.*, 96 U. S. 395, is not in point, because there the owner had leased the property as a distillery, and knew it was used as such. The purpose for which the land was leased being the licensed purpose to which the regulations of the government applied, obedience to those regulations was justly required of the lessor, and, when the lessee disobeyed those regulations to defraud, the lessor was responsible. The court says: "If he knowingly suffers and permits his land to be used as a site for a distillery the law places him on the same footing as if he were the distiller * * * and if fraud is shown in such case the land is forfeited just as if the distiller were the owner." Such is not the case here.

It is urged that section 12 is unconstitutional, because it does not provide for due process for the forfeiture and sale of property. It may be that notwithstanding no special proceeding is provided, a civil action under the code to determine title to the property and declare it forfeited would lie, but it is not necessary for us to determine this question in view of what we have already said. Neither do we decide whether the lawful property of an innocent person might be forfeited under sections 11 and 12.

What we do hold is, that sections 11 and 12 do not apply to this case, that there is no forfeiture under section 13 and that section 20 does not destroy the property of an innocent owner or mortgagee in things which are not in themselves obnoxious to the purpose of the statute.

Judgment should be reversed with directions to dismiss the proceedings.

No. 9683.

BOSKO ET AL v. THE PEOPLE.

1. CRIMINAL LAW—*Former Jeopardy*, must be specially pleaded. The question cannot be raised by a motion for an instructed verdict.

2. **INFORMATION—Irregularity—Waiver.** Where the District Attorney presents an information as a substitute for one already pending, and the accused, without objection, pleads thereto, he waives all irregularity in the proceeding and the question of prior jeopardy.
3. --- **Affidavit.** Where two offenses are charged in the information, supporting affidavit reciting "that the facts set forth in the foregoing information are true and that the *offense* therein charged was committed" held to cover both. *Ausmus v. People*, 47 Colo. 165, followed.

Error to the Pueblo District Court, Hon. S. D. Trimble, Judge.

Mr. A. T. STEWART, JR., Mr. R. C. MORRIS for plaintiffs in error.

HON. VICTOR E. KEYES, Attorney General; Mr. FORREST C. NORTHCUTT, Assistant, for The People.

Mr. Justice Burke delivered the opinion of the court.

MAY 26, 1919, information No. 16088 was filed in the District Court of Pueblo County. This information contained a single count of two paragraphs, the first of which charged both of the plaintiffs in error (hereinafter referred to as defendants) with the murder of William T. Hunter; the second charged both with the murder of Elton C. Parks. It was supported by the affidavit of S. E. Thomas reciting: "That the facts set forth in the foregoing are true and that the *offense* therein charged was committed of his own personal knowledge." May 27, 1919, defendants were arraigned and entered their plea of guilty to this information. Under such circumstances sec. 1624, Rev. Stat., 1908, provides that a jury shall be impaneled "to which shall be submitted, as the sole issue in the case, the question whether the killing was murder of the first or second degree. The jury in every such case shall find the degree thereof, and, if murder of the first degree, shall fix the penalty at

death or imprisonment for life * * * provided that no person shall suffer the death penalty who, at the time of conviction, was under the age of 18 years; nor shall any person suffer the death penalty who shall have been convicted on circumstantial evidence alone." May 28, 1919, the cause was set for such hearing before a jury, June 5, 1919. On the last mentioned date information No. 16095 was filed. It differs in no particular from the former information except that it is divided into two counts, the first of which charges both defendants with the murder of Hunter; the second charges both with the murder of Parks. The supporting affidavit is the same as that in 16088. When this last information was filed it was substituted for information No. 16088, and thereafter defendants, without objecting to this order of substitution, entered thereto their plea of guilty and the hearing before the jury was proceeded with on information No. 16095.

There was direct evidence of the murder of Hunter, but only circumstantial evidence of the murder of Parks. Defendant Tom Bosko was shown to be under eighteen years of age.

A part of the evidence introduced on behalf of the people, over the objection of defendants, concerned alleged confessions made by them. These confessions were in the form of questions and answers, and their accuracy was testified to by a stenographer who took them in shorthand and extended them in typewriting. These documents, as they appear in the bill of exceptions, contain defendants' witnessed signatures. The stenographer had not seen these signatures affixed and no other witness was called to prove them. At the close of peoples' testimony defendants moved for a directed verdict, on the ground of former jeopardy, which motion was overruled. June 6, 1919, the jury returned verdicts finding George Bosko guilty of murder in the first degree on the first count of the information and fixing the penalty at death; finding the same defendant guilty of murder in the first degree on the second count of the information and fixing the penalty at life imprisonment;

finding Tom Bosko guilty of murder in the first degree on each count, and fixing the penalty in each verdict at life imprisonment. Motions for new trial and in arrest of judgment having been overruled judgment was pronounced by the court upon the verdicts, and thereafter such further proceedings were had that the cause is now before us for review on error.

Burke, J, after stating the facts as above.

Defendants make three principal contentions which it is necessary to notice here: That they were twice placed in jeopardy; That the affidavit supporting the information under which they were sentenced was insufficient; That evidence of alleged confessions was improperly admitted against them.

FIRST—If there were otherwise any merit in the plea of former jeopardy it was improperly presented and came too late. In this jurisdiction it must be specially pleaded. *Guenther v. People*, 22 Colo. 121-123, 43 Pac. 999. Where such is the rule the question may not be raised, as here, by motion for an instructed verdict. *Territory v. Lobato*, 17 N. M. 666, 134 Pac. 222, L. R. A. 1917A 1226. When defendants entered their plea in No. 16095 and went to hearing thereon before the jury without objecting to the substitution of this information for No. 16088, and without raising the question of former jeopardy, they waived that defense. *Gue v. City of Eugene*, 53 Ore. 282, 100 Pac. 254-256.

SECOND—It is urged that the affidavit supporting the information is insufficient because it is made only as to one offense, whereas the information charges two. This question has heretofore been before us and this identical affidavit held sufficient. *Ausmus and Moon v. People*, 47 Colo. 165-174, 107 Pac. 204.

THIRD—It is urged against defendants' confessions that they were not shown to be voluntary, and even if voluntary were not properly proven.

There is much evidence that these confessions were voluntary and little to the contrary. Upon this evidence they were admitted by the trial court and we see no reason to

disturb that ruling. "The trial judge, on a conflict in the evidence, regarding the voluntary character of the statement purporting to be the confession of the defendant, resolved the question in favor of the people, and its admission under the circumstances, being, to some extent, in the discretion of the court, his action in this respect can not be disturbed when the evidence, as it does in this case, at the time when the motion to withdraw it was interposed, supports the conclusion that the confession was a voluntary one." *Fincher v. People*, 26 Colo. 169-174, 56 Pac. 902. It is contended that these confessions were inadmissible because the signatures thereto were not proven. The absence of such proof is wholly immaterial. They did not depend thereon for their admissibility. Had the signatures been proven the confessions might have been admitted without the testimony of the stenographer. They would then have depended for their admissibility upon the proof of the signatures and been admitted under the rule governing written confessions. In the absence of such proof their admissibility rested entirely upon the evidence of the stenographer who took them. Her testimony is not of the execution of written documents but of oral conversations, supplemented by the transcript of those conversations from her shorthand notes and the presentation thereof to the court, hence the objection is without merit.

Finding no prejudicial error in this record the judgment is affirmed.

It is further ordered that the judgment against George Bosko, entered on the verdict returned in the first count of the information, be executed during the week commencing June 21, 1920.

Allen, J., not participating.

No. 9747.

COZART v. HAINES.

JUDGMENT BY CONFESSION—*Vacation*. A judgment by confession under warrant of attorney must be vacated when the defendant, in apt time, by motion supported by affidavit, shows a meritorious defense.

Error to El Paso District Court, Hon. John W. Sheafor, Judge.

MESSRS. CUNNINGHAM & FOARD, for plaintiff in error.

Mr. F. F. SCHREIBER, and Mr. JAMES A. ORR, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

IN this case defendants in error took judgment by confession under warrant of attorney attached to a promissory note. The plaintiffs in error in apt time filed a motion to set aside the judgment, supported by affidavit setting forth a meritorious defence to said note. This motion was overruled. The case is before us upon error and application for supersedeas.

The court should have sustained the motion. This rule is too well settled in this jurisdiction for further controversy. *Ferguson v. Bank*, 67 Colo. 184, 184 Pac. 370; *Richards v. Bank*, 59 Colo. 403, 148 Pac. 912.

The judgment is reversed.

No. 9758.

THE PEOPLE v. THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER.

1. JUDGMENT—*Construed*. An order entered by the Clerk can not nullify the judgment subsequently entered by the court.
2. PROHIBITION—*When the writ lies*. Not when the error complained of may be reviewed upon error.

Application for Writ of Prohibition.

MR. W. A. GUNKLE, for petitioner.

MR. H. R. KAUS, MR. HENRY E. MAY, for respondents.

Mr. Justice Teller delivered the opinion of the court.

THE petitioner and the respondent, wife and husband, entered into a separation agreement by which the children of the parties were given to the respondent, with privilege to the petitioner to visit them.

The respondent sent the children, apparently with the consent of the petitioner, to his parents in California, as is stated, for a visit. When they were not brought back at the beginning of the school year, the petitioner filed an application for a writ of *habeas corpus* and the writ was issued. Upon a hearing, the agreement of separation having been established, and the court having heard evidence as to the removal of the children from the court's jurisdiction, the court quashed the writ. The court further ordered that the respondent have the care and custody of the children, with the privilege to the petitioner to see them at reasonable times. Thereupon the petitioner moved to modify the order by striking out the provision as to the custody of the children, which motion was denied. The petitioner in the meantime visited California, got the children and brought them to this state. They were not produced in court.

The record contains an entry of an order under date of January 3, 1920, dismissing the writ of *habeas corpus* and awarding the custody of the children to the father.

To the part of the order which gave the father custody of the children, counsel excepted upon the ground that such order could not be made unless the children were before the court.

He now raises the further point that inasmuch as that part of the order followed the part quashing the writ of *habeas corpus*, it was made without jurisdiction, the court, as he says, having exhausted its powers.

The record shows further a formal decree under date of January 6, 1920, in which the court makes findings, quashes the writ and awards the custody of the children to the father.

It is evident that the orders of January 3rd were made by the clerk, without regard to the fact that a formal judgment and decree might thereafter be entered. It cannot be that the entry by the clerk of one part of an order before another could nullify the part placed last. Looking to the judgment of January 6th, we must consider the entire judgment as a single act of the court. The parties had litigated the question of the custody of the children, and the only objection made to the order at the time, was that the children were not before the court. Inasmuch as the petitioner had, on the day the order was entered, taken possession of the children and subsequently refused to obey the order to bring them into court, it is clear that we cannot entertain this objection.

The error in the court's ruling, if any, can be reviewed in this court on error, and there is no reason why the writ of prohibition should issue. The application for the writ is therefore denied, and the rule to show cause discharged.

Writ denied and rule to show cause discharged.

En banc.

Mr. Justice Allen and Mr. Justice Burke not participating.

No. 9649.

Prior et al. v. Noland.

1. CONSTITUTIONAL LAW.—*Construction of the Constitution.* In construing any provision of the Constitution the presumption is in favor of the meaning in which the words in question are usually understood.
2. — *Referendum*, does not extend to resolutions. In view of the precise words of sec. 1 of art. V, of the Constitution by which the referendum is extended to any act, or part of an act; that the petition shall be filed within a specified period from the adjournment of the session of the General Assembly that passed the bill on which referendum is demanded, and that the filing of a referendum petition against any act, or part of any act shall not delay the remainder of the act from

becoming operative, *held* that the referendum is not granted to a mere resolution; e. g., amendment proposed by Congress to the Federal Constitution.

Herbering v. Brown (Ore.), 180 Pac. 328; in re Opinions of Justices (Maine), 107 Atlantic 673, followed.

The "Legislature," as used in Article 5 of the Federal Constitution, means the body composing the ordinary law-making body of the state.

The people have no power to ratify amendments proposed to the Federal Constitution, and therefore cannot exercise the referendum upon such resolution adopted by the Legislature.

Error to the Denver District Court, Hon. Julian H. Moore, Judge.

Mr. WALTER M. APPEL, Mr. N. WALTER DIXON, for plaintiffs in error.

Mr. VICTOR E. KEYES, Attorney General; Mr. WILLIAM R. RAMSEY, Assistant Attorney General; Mr. CHARLES ROACH, Deputy Attorney General; Mr. HARRY C. RIDDLE, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is a suit in mandamus. The trial court sustained a demurrer to the petition, and a judgment of dismissal was entered. The petitioners bring the cause here for review, assigning as error the sustaining of the demurrer.

The petition for a writ of mandamus, with the exhibit attached thereto, discloses the following facts:

The Sixty-fifth Congress of the United States, at its second session, in December, 1917, by a joint resolution duly adopted, proposed an amendment to the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On January 15, 1919, the General Assembly of the State of Colorado ratified the proposed amendment by a concurrent resolution, which, after reciting the Joint Resolution of Congress, proposing the amendment, contains the follow-

ing language: "*Therefore, Be It Resolved*, by the General Assembly of the State of Colorado, That the said proposed amendment to the Constitution of the United States of America be and the same is hereby ratified by the General Assembly of the State of Colorado." Thereafter, and prior to June 10, 1919, referendum petitions were prepared and signed, and were tendered, for filing, to the Secretary of State. In these petitions, the signers "order and demand" that the resolution of the General Assembly, ratifying the National Prohibition Amendment, "shall be submitted to the legal voters for their adoption or rejection at the polls," etc. The three persons designated to represent the signers of the referendum petition are the petitioners in this mandamus suit, the plaintiffs in error.

The Secretary of State of Colorado, who is the respondent in this case, the defendant in error, refused to file the petitions, or to so act in the premises, whereby the concurrent resolution in question would be submitted to the voters at the next general election for their adoption or rejection. It is to compel him to thus act, and to file the petitions, that the writ is sought.

The demurrer which was sustained, and the argument thereon, present two questions, namely:

1. Does Article V of the federal Constitution, providing for ratification of proposed amendments "by the legislatures of three-fourths of the several states," forbid the exercise of the referendum upon a joint or concurrent resolution of the General Assembly ratifying a proposed amendment to the Constitution of the United States?

2. Does Section 1 of Article V of the Constitution of the State of Colorado authorize and permit the exercise of the referendum upon such resolution?

Our discussion will be confined, chiefly, to the provisions of the state Constitution relating to the referendum; in other words, to the second question above mentioned.

Section 1 of article V of the state Constitution, so far as the same is pertinent to this case, reads as follows (*italics ours*):

"Section 1. The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose *laws* and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their option to approve or reject any *act*, item, section or part of any *act* of the general assembly. The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition * * *. The second power hereby reserved is the *referendum*, and it may be ordered * * * against any *act*, section or part of any *act* of the general assembly * * *. Referendum petitions shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly, that passed the *bill* on which the referendum is demanded. The filing of a referendum petition against any item, section or part of any *act*, shall not delay the remainder of the *act* from becoming operative. The veto power of the governor shall not extend to *measures* initiated by, or referred to the people. All elections on *measures* referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the *law* or a part of the Constitution, when approved by a majority of the votes cast thereon * * *. This section shall not be construed to deprive the general assembly of the right to enact any measure * * *. The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance herewith." From the above quoted constitutional amendment, it is seen that the people, in granting legislative powers to the general assembly, reserved to themselves "the power at their option to approve or reject any act * * * of the general assembly."

The controversy in the instant case, upon the question now under consideration centers about the word "act" in

the clause last above quoted. It is the contention of the plaintiffs in error that the word is broad enough to comprehend not only a general statute, enacted by a bill, but also such a concurrent resolution as the one involved in this case.

The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them. 12 C. J. 705. In the popular sense, the term "act" refers to a general statute, or law, enacted by a bill. A resolution, concurrent or otherwise, is commonly referred to as a "resolution." The rule that the words and terms of a Constitution are to be interpreted and understood in their most natural and obvious meaning, also tends to exclude a resolution from the meaning of the term "act." An act is a law, and under our state Constitution, "no law shall be passed except by bill." Sec 17, Art. V. It is only in the sense of a law, a statute, that the term "act" is used in the initiative and referendum constitutional amendment. This conclusion is aided by the fact that the term in question is used in connection with the word "bill," where it is provided, that referendum petitions shall be filed, etc., after the adjournment of the general assembly that "passed the bill on which the referendum is demanded." The concurrent resolution involved in the instant case was not passed by a bill; neither does it have the enacting clause, required for "the laws of the state" by Section 18, article V, of the state Constitution. A resolution is not a bill. *May v. Rice*, 91 Ind. 551. The distinctions between a bill and a resolution are well defined. *Henderson v. Lithographing Co.*, 2 Colo. App. 257, 30 Pac. 40. Under these circumstances, we may adopt the following language, contained in *Lithographing Co. v. Henderson*, 18 Colo. 262, 32 Pac. 417. "The concurrent resolution adopted by the senate * * * and by the house * * *, cannot be held to be a law of the state. The resolution was not passed by 'Bill' as provided by sections 17 and 18 of the Constitution."

In *Herbring v. Brown*, 92 Ore. 176, 180 Pac. 328, the supreme court of Oregon, without a dissenting vote, held that the various sections of their initiative and referendum

constitutional amendment "apply only to proposed laws, and not to legislative resolutions, memorials, and the like," and therefore did not apply to the legislative resolution involved in that case, which was a joint resolution of their Legislative Assembly, ratifying the National Prohibition Amendment. The Oregon Court in arriving at its conclusion, considered and adopted the sense in which the terms "bill" and "act" were used in the Constitution before the initiative and referendum amendments were adopted. The same method may properly be employed in the instant case, with the same result, holding that the term "act," as used in the various parts of the Constitution, "means a bill which has been enacted by the Legislature into a law," and further that: "The initiative and referendum amendments were passed and should be construed in the light of the construction put upon the terms 'bill' and 'act' by the instrument they proposed to amend, and taking this view it must be held that, as a joint resolution is neither a bill nor an act, it is not subject to the referendum." The decision of the Oregon court, holding that a legislative resolution ratifying an amendment to the federal Constitution could not be referred to the people, was not based on any grounds going beyond the provisions of the state Constitution itself, or the matters hereinbefore discussed. What has already been said in this opinion is sufficient to dispose of this case, resulting in the determination that our state Constitution does not authorize or permit the exercise of the referendum on any concurrent resolution, or upon the one involved in the instant case.

There are other reasons why the resolution involved in this case is not subject to the referendum. One of these is suggested by the argument of the plaintiffs in error, wherein they state that "it is not reasonable to believe" that the people intended, when adopting the initiative and referendum amendment, "to deny to themselves the right to adopt or reject a measure which, once adopted, can never be amended or repealed except by the concurrence of three-fourths of the States of the Union." In ordinary legislative

matters, the general assembly, of course, derives its power from the people of the state, and the people may reserve to themselves any power they desire, but in the matter of the ratification of a proposed amendment to the federal Constitution, the general assembly does not act in pursuance of any power delegated or given to it by the state Constitution, but exercises a power which it possesses by virtue of the fifth article of the Constitution of the United States. That article provides that proposed amendments "shall be valid, * * * as parts of this constitution, when ratified by the legislatures of three-fourths of the several states." A ratification by a general assembly, of a proposed amendment to the federal Constitution, is not, therefore, law-making legislation for the state, subject to approval or rejection by the referendum. Further, in this connection, we adopt the language of *In Re Opinion of Justices* (Maine), 107 Atl. 673, 674, as follows: "* * * The state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or, might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly." The conclusion just stated, as it is expressed in the paragraph above quoted, results from our opinion upon the question, raised by the demurrer, whether or not the federal Constitution, in Article V thereof, permits a referendum of a resolution of a general assembly which ratifies a proposed amendment to the Constitution of the United States. Article V provides for a ratification of proposed amendments by the "legislatures." It is the contention of the plaintiffs in error

that the word "legislature" thus used means "the whole legislative power of the state." This definition is intended to be made applicable in the instant case by including the legislative power of the people as given by the referendum. In our opinion, however, the term "legislature" as used in Article V of the federal Constitution, means that body of persons composing the ordinary representative lawmaking body of the state. Under that definition it necessarily follows that the people have no power to ratify a proposed amendment to the federal Constitution, by a popular vote, and therefore cannot exercise the referendum upon such a ratifying resolution as is involved in the instant case. The conclusion we reach in this matter is the one adopted, and ably supported, in the opinion of the Justices of the Supreme Judicial Court of Maine, all justices concurring, reported in 107 Atl. 673. A discussion of this subject, which arrives at the same result, may be found in the dissenting opinion of Justice Parker in *State v. Howell* (Wash), 181 Pac. 928. The judgment is affirmed.

Affirmed.

En Banc.

Mr. Justice Burke and Mr. Justice Teller concur in the conclusion. Mr. Justice Denison dissents.

Denison, J., dissenting:

I cannot agree with the majority opinion.

The so-called National Prohibition Amendment to the Constitution of the United States was ratified by the General Assembly of Colorado by the passage of House Concurrent Resolution No. 1.

This is a suit in the District Court for mandamus to compel the Secretary of State to submit the matter to the People under the so-called Referendum section of the State Constitution. Acts of 1910, p. 11. The District Court sustained a demurrer to the petition and dismissed the cause.

No question is raised as to the sufficiency of any of the proceedings. The question is whether such a proceeding by the Legislature is subject to the referendum.

It seems to me that there are two questions upon which the answer to the above main question depends: 1st. Whether under the United States Constitution (Art. V), the resolution of ratification may be referred to the people. 2nd: Whether the Constitution of this state (Art V, Sec. 1), as amended (S. L. 1910, p. 11), permits the referendum of such a resolution.

Upon the first point the question turns upon the meaning of the word *legislatures* in Const. U. S., Art. V. Under that article the proposed amendment takes effect "when ratified by the *legislatures* of three-fourth of the several states, or by conventions in three-fourths, as the one or the other mode of ratification may be proposed by the Congress." The word legislature has two ordinary and well recognized meanings: 1. The law making power, whatever that may be. 2. That representative body of men chosen by the people to enact laws.

The plaintiff in error claims that the first is the meaning to be attached to it here. This question seems to me to be settled by the case of *Davis v. Ohio*, 241 U. S. 565, 60 L. Ed. 1172, 36 Sup. Ct. 708. The United States Constitution, Art. I, Sec. IV, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof." In the above case it was held that, under the United States Constitution the act of the General Assembly of Ohio re-districting that state for members of Congress was subject to referendum. This necessarily holds that the word "*legislatures*" in Art. I, Sec. IV of the Federal Constitution means "*legislative power*." I can see no difference between the use of the word legislature in Art. 1, Sec. 4, and its use in Art. V. True; the Supreme Court of the United States did not mention this question (of the meaning of the word "*legislature*"), it only said that the question whether the referendum destroyed republican government in Ohio was for Congress and not for the courts; but it upheld the referendum, which it could not logically do except upon the assumption that the word "*legislature*" included it. This decision

by the United States Supreme Court upon a federal question must control us. It must therefore be said that, so far as the federal constitution is concerned the referendum is permitted on the question of ratification of a proposed amendment of that constitution.

As to the second point: Our state Constitution provides that the referendum may be ordered "against any *act*, section or part of any *act* of the General Assembly." Other parts of the section refer to referendum on "Act" or "bill." The argument is that the word "act" is used in its restricted, narrow sense, and that because the ratification was by resolution it cannot be referred. Some states ratify by act and some by resolution. Can it be said that the acts may be referred but not the resolutions? This, of course, leads to the conclusion that the Legislature may evade the referendum, for some purposes, at will. See Sen. Concur. Res. No. 6, S. L. 1919, p. 769; Sen. Joint Res. No 2, 1913, p. 692; S. L. 1911, p. 701; House Res. No. 6, 1909; Sen. Conc. Res. No. 3, 1899; Sen. Res. No. 11, 1901. But the manifest purpose of the initiative and referendum amendment was to reserve to the people control over legislation. The conclusion is unavoidable that any resolution which amounts to legislation is subject to the referendum. The ratification is unquestionably a legislative act. It is making law. Legislation is making law. Jameson Const. Conv., Sec. 513 and 547. It follows that the resolution in question is subject to referendum.

The case of *Collier v. Henderson*, 18 Colo. 259, 32 Pac. 417, holds that, under the Colorado Constitution, a *law* cannot be passed in the form of a resolution, but only by bill enacted according to constitutional form. If this is material to the present case, it can only be to show either that the resolution of ratification was not an act, or that it was not properly passed. It may be conceded at the outset that it was not a bill and upon its passage did not become an act in the sense in which the word is used in the above case, but it created a law; it, with resolutions or acts of other states, subjects the people of this state and the United

States, to a permanent rule of action to which they otherwise would not be subject. This is a quality of law and not of mere resolution.

It may be conceded that the intent was to exclude ordinary resolutions from the referendum; but here is a resolution not of the ordinary kind, not within the definition of resolution, in the law dictionaries and opinions. It does not merely provide for the doing some particular thing or series of things with the principal purpose of showing authority therefor, nor is it local or temporary in its nature, nor does it relate to some particular person or class of persons. It is not a recommendation or request. It has indeed none of the qualities of a resolution except its form and name. It has, as above stated, the essential and fundamental quality of an act or law, i. e., it fixes a rule of action for all people. It is therefore within the spirit and purpose of the amendment.

If it be claimed that we have proved too much, because, if the resolution be a law, it should have been enacted by bill in constitutional form, the answer is, so be it. If it is impossible constitutionally to legislate in Colorado except by bill then the prohibition amendment has never been ratified by Colorado. To conclude otherwise is to put form before substance, words before spirit and purpose. I do not, of course, maintain such a proposition, but think that the custom of conducting this particular legislation being sanctioned by its acceptance by Congress for a century makes it a valid method. Nature and substance—not form, control.

To recapitulate. 1. The referendum of the resolution of ratification is permitted under the Constitution of the United States, because the question turns on whether the word "legislature" means legislative power, of whatever kind. It is a question of construction of the Federal Constitution, on which we are controlled by the Federal Supreme Court. That court has held that the word does mean legislative power. 2. The referendum of the resolution is permitted under the state constitution, because the initia-

tive and referendum amendment must be construed to effectuate its purpose. It is the manifest purpose of the people that by referendum they shall retain control of legislation. We know this from the amendment itself, and from the history of its origin, propagation, development and enactment. The resolution of ratification is legislation in its most solemn form. Therefore it is subject to the referendum. Case should be reversed.

No. 9735.

Zinn et al. v. Denver Livestock Commission Company.

1. TORT—*Waiver of.* Except as to those which are purely personal a tort may be waived, and an action brought in assumpsit.
2. ASSIGNMENTS—*What May Be Assigned.* A right of action for the conversion of personalty; or a claim for damages to property.
3. CHATTEL MORTGAGE—*Description.* A mortgage with an insufficient description is aided by an agreement of the parties as to what is included.
4. —*Parol Evidence as to Description.* The mortgagee may show that the chattels which he claims are those intended to be included in the mortgage, though they are not properly described.
5. —*Notice of Mortgage.* One dealing for personal goods with notice of a mortgage thereon is bound by the mortgage, regardless of any defects in the description.
6. —*Assumption of Possession by Mortgagee,* cures all minor defects, e. g., insufficiency of description.

Error to Denver District Court, Hon. Henry J. Hersey, Judge.

Department One.

Mr. PHILIP HORNBEIN, for plaintiff in error.

MESSRS. PONSFORD, CARNINE & KAVANAUGH, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFFS in error brought suit against the defendant in error to recover a balance upon certain promissory notes made by one Willmott, to the order of The Drovers Cattle Loan Company, and secured by a chattel mortgage upon 244 head of cattle in Weld County, Colorado, in which county the mortgage was duly recorded. The said notes and mortgage had been transferred to and were owned by the plaintiffs in error at the time the suit was brought.

The answer contained a general denial, and a special defense not urged at the trial. The case was tried to a jury, and the court directed a verdict for the defendant, which was accordingly returned. From a judgment on such verdict, plaintiffs below bring error.

Defendant in error raises a question as to the right of the plaintiffs in error, assignees of the note and chattel mortgage, to recover for a conversion which occurred before the assignment. This is a matter which should be determined at the outset. It does not appear that this question was raised during the trial. The point was made, however, in a motion for a directed verdict, that the evidence did not show that the cause of action sued upon had been assigned. The point now made by defendant in error is that it could not be assigned. In support of their contention counsel cite *First National Bank v. McCreary*, 66 Ore. 484, 132 Pac. 718; *Bowers v. Bodley*, 4 Ill. App. 279 and *Overton v. Williston*, 31 Pa. St. 155. The last mentioned case holds simply that the right of action in trover for machinery removed could not, at common law, be assigned. The Oregon case cited quotes from Jones on Chattel Mortgages a statement which supports counsel's contention, but the citation to the text is only that of *Bowers x. Bodley, supra*. The case cites also 27 Cyc. 1299, 7 Cyc. 60. The only citation to support these texts is this same case, *Bowers v. Bodley*. The Oregon case entirely overlooks the fact that in the Code states rights are, in general, no longer determined by the form of the action. The Illinois case cited is based, of course, upon the common

law which prevails in that state. The general rule is that, except as to purely personal torts, the tort may be waived and suit be brought in assumpsit. In *Shultz v. Christman*, 6 Mo. App. 338, the court said: "If the right is essentially one of property, as distinguished, for example, from a personal tort, the fact that case or trover may lie to secure the right does not prove that it is not assignable under the statute." In *Hamlin v. Carruthers*, 19 Mo. App. 567, the court said: "Civil action is the remedy for every civil wrong. * * * If, * * * the plaintiff's property be wrongfully taken without his consent, so that no element of contract enters into the transaction, the right of action is not assignable. But if, as in the present case, there appears a feature of violated agreement, express or implied, as between consignor and consignee, or otherwise, the right of action is assignable under our statute." In *McKeage v. Insurance Co.*, 81 N. Y. 38, 37 Am. Rep. 471, it is held that an assignment of right to property converted, after the conversion, gives assignee a right of action. The earlier cases of *Sherman v. Elder*, 24 N. Y. 381, *Waldron v. Willard*, 17 N. Y. 466, are to the same effect. See also *Johnson v. Railroad Co.*, 82 Miss. 452, 34 So. 357. The rule is the same in this state. In *Home Insurance Company v. Railroad Company*, 19 Colo. 49, 34 Pac. 282, it was held that a claim for damages to property might, under our statute, be assigned, so as to vest in the assignee a right of action in his own name; and that "the general rule is that assignability and descendability go hand in hand." That case is followed in *Mumford v. Wright*, 12 Colo. App. 214.

While the complaint alleges a conversion, it falls far short of a pleading in an action of trover. Complaint is made that the defendants sold the cattle and "did not pay over the proceeds thereof to the mortgagee in payment of the indebtedness secured by the mortgage." The prayer of the complaint is for judgment for the sum due on the notes. The plaintiffs in error had an undoubted right of action as assignees of the note and mortgage.

Turning now to a consideration of the case on its merits, it appears that the chattel mortgage, after mentioning the number of cattle of the different ages and sexes, stated the brands thereof. There were three brands, a "lazy S," "M W" and a "slash W." In the mortgage the figure "98" was placed above the "lazy S" and "74" above the "M W," those being the number of cattle bearing respectively those brands. The defense was that the cattle sold were not the cattle described in the mortgage, inasmuch as there were no cattle branded "98" with an "S" beneath it, nor "74" with an "M W" beneath it. Part of the proceeds of the sale, about \$4,900, was turned over to The Drovers Cattle Loan Company, and the balance was retained by the defendant and applied in liquidation of an indebtedness due it from the mortgagor. It appears from the evidence that when the cattle were in the yards to be sold, an officer of The Drovers Cattle Loan Company informed the secretary of the defendant in error that the former company had a mortgage upon said cattle. The plaintiffs in error now contend that, inasmuch as a chattel mortgage is filed for the purpose of giving constructive notice, and the defendant in error had actual notice, the sufficiency of the description in the chattel mortgage need not be considered. Counsel, in reply to this contention, assert that there were, in fact, no cattle mortgaged, hence there could be no notice of a claim to a lien on the cattle sold.

It will not be denied that a mortgage with an insufficient description of the property attempted to be described, is good as between mortgagor and mortgagee; they having agreed as to what should be covered by it. Counsel for defendant, by their objections, prevented a trial of the question as to what was intended by the parties to be included in the mortgage. They appear to overlook the fact that the question of there being a mortgage at all is quite distinct from the question of how far, if there be one, it was effective in giving notice of the mortgagee's lien. In *Beaman v. Bank*, 35 Colo. 573, 85 Pac. 426, it was contended that the creditors of the mortgagor of cattle were bound only by the

description in the mortgage, the brands named in the mortgage not corresponding with those upon the cattle sought to be taken in attachment by a creditor of the mortgagor.

This court there said: "The brands would aid in identifying the cattle, but were not the only aids which could be resorted to for that purpose. The testimony, independent of the brands, established that the cattle awarded the plaintiff were the identical cattle included in the mortgages." This case recognizes a right in the mortgagee to show that the cattle claimed by the mortgagee were the cattle intended to be included in his mortgage, though not properly described. It was the right of the plaintiffs below to introduce evidence upon this point and have the matter determined by a jury.

Defendant in error contends that the case of *Sigel-Campion Live Stock Co. v. Holly*, 44 Colo. 580, 101 Pac. 68, is authority in this case; because, counsel say, it was there determined that when it was established that the mortgagor had more cattle bearing the brand mentioned in the mortgage than the number stated in the mortgage, the mortgagee acquired no lien as against a third person. If the rule in that case is to be applied to the facts here, there was another question which should have been submitted to the jury; that is, whether or not Willmott had other cattle bearing the brands which the plaintiff contends were borne by the cattle actually mortgaged. There was evidence by Willmott that he had such other cattle, and upon the part of the plaintiffs that he did not have them. That was a matter which should have been determined by a jury.

If it were found that the cattle sold were the cattle mortgaged, then actual notice of that fact, or the sufficiency of the description to give constructive notice of the fact, became matters for determination. The question of notice to the defendant below was one of fact. If the Cattle Commission Company had notice that the assignor of the plaintiffs had a mortgage upon the cattle in its yards, it would be bound by the mortgage regardless of a defective description of said cattle. Whether or not a description, aided by

such inquiries as the mortgage suggests, is sufficient to identify this property, is a question for the jury.—*Strauss v. Austgen*, 67 Colo. 207, 134 Pac. 299.

Still another question of fact is involved. There is evidence that the cattle were shipped in on the order of the mortgagee, though witnesses speak of the shipment as having been made by the mortgagor. The determination as to who assumed possession on the shipment is important, since if the mortgagee had taken possession, all minor defects, such as insufficiency of description in the mortgage, were cured. *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Horn v. Reitler*, 12 Colo. 310, 21 Pac. 186.

There being these matters in evidence which were proper for the jury to consider, the court erred in directing a verdict for the defendant. The judgment is accordingly reversed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9739.

Clark et al. v. O'Donnell et al.

1. ATTORNEY'S LIEN—*Properties Received by the Attorney in Trust.*

Plaintiffs, a firm of attorneys, contracted with the defendant, Clark, to prosecute his claim for 700,000 shares in the capital of a certain corporation and prevailed in the action. One of the attorneys afterwards received the certificates representing the shares, "on behalf of" the client, and transmitted them to a trust company in an eastern city, which held them by agreement as trustee for the client, as to a portion of the shares, and as to the residue as trustees for others who had advanced money to consummate the purchase. The attorneys claimed a lien only upon the share of the client. *Held* there was no room for the application of the rule which denies the attorney a lien upon properties held for a special purpose, adverse to the lien.

2. —*Notice of the Lien.* An agreement by the client with others who provided the money required to complete the purchase of

the shares, that the certificate should be deposited with a certain trust company, for the benefit of the client and these contributors, and the actual transfer of the certificates to the trust company, with notice of the lien upon the interest of the client, was held not to defeat or impair the lien.

The notice required by the statute is not a prerequisite to the validity of the lien.

3. —*Properties Held by Another*, as trustee for the client, but which are the result of the attorney's services, are subject to the lien.
4. CORPORATE STOCK—*Situs of*, is the state where the corporation was created.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Mr. HALSTED L. RITTER, Mr. HAMLET J. BARRY, for plaintiffs in error.

Mr. HORACE N. HAWKINS, Mr. GEORGE W. MUSSER, for defendants in error.

Mr. Justice Allen delivered the opinion of the court.

THE defendants in error, plaintiffs below, T. J. O'Donnell and others, are a firm of attorneys-at-law, and instituted this action against the plaintiffs in error, N. F. Clark and others, to foreclose an attorney's lien on the interest of Clark in 700,000 shares of the capital stock of the plaintiff in error, The Mexico-Wyoming Petroleum Company.

Clark was the only defendant who filed an answer in the court below. The answer admits the following allegations of the complaint, which are quoted for the purpose of showing some of the facts leading up to the institution of this case. "4. That on or about the 24th day of July, A. D. 1915, the defendant Clark retained and employed the plaintiffs in and about the matter of enforcing a certain contract before that time entered into by him, the said Clark, with the defendant, The Mexico-Wyoming Petroleum Company, under and by the terms of which he, the said Clark, in consideration of * * * (etc.) had acquired the right

and option to purchase seven hundred thousand (700,000) shares of the capital stock of the said company, being what is commonly called treasury stock thereof, at and for the price of one hundred thousand dollars (\$100,000). 5. That under and by virtue of the said retainer and employment, the plaintiffs thereafter rendered and performed for the defendant Clark divers services as attorneys and counsellors at law in the states of Colorado, Wyoming, Pennsylvania, Illinois, New York, Massachusetts and Michigan, which services continued from the date of the said employment until, to-wit, December 2, 1916, and resulted in the enforcement of the said contract through a decree and final judgment duly entered prior to the date last aforesaid in the District Court of the State of Wyoming, in and for Hot Springs County, * * * in a certain cause in which the said N. F. Clark was plaintiff and the said The Mexico-Wyoming Petroleum Company and others were defendants, which cause was brought and prosecuted to final judgment by these plaintiffs as attorneys for said Clark, under their said employment by him, and under and by the terms of which said decree the said defendant, The Mexico-Wyoming Petroleum Company, was required to issue and deposit in the registry of said court a certificate for seven hundred thousand (700,000) shares of the capital stock of said last named company, to be delivered to the said Clark if he should pay into the registry of said court the sum of ninety-two thousand dollars (\$92,000), which was the balance of the sum which the said Clark was required under the terms of said contract to pay to the defendant, The Mexico-Wyoming Petroleum Company for the said seven hundred thousand (700,000) shares of stock. 6. That thereafter the defendant, The Mexico-Wyoming Petroleum Company did, in compliance with the terms of said final decree, issue a certificate for seven hundred thousand (700,000) shares of its capital stock in the name of the defendant Clark, and did deposit the same in the registry of the said court within the time fixed by the said decree for such deposit to be made by it; and thereafter the said Clark did pay into the reg-

istry of the said court the said sum of ninety-two thousand dollars (\$92,000), and such payment into such registry was made within the time fixed by the said decree for the making of the same. 7. That afterwards these plaintiffs, as the attorneys of the said Clark, obtained, on behalf of the said Clark, leave and permission of the said Hot Springs District Court to withdraw the said certificate from the registry of said court; and the said certificate came into and was in the possession of these plaintiffs, as attorneys for the said Clark, at Denver, Colorado, on the date next hereinafter mentioned (December 2, 1916). 9. That the defendant Clark had, before the date next hereinafter mentioned (December 2, 1916), interested divers other persons in the purchase of the said seven hundred thousand (700,000) shares of stock under the said contract, and it had been agreed between the said Clark and the said divers other persons and the said defendant, The Union Trust Company of Pittsburg that when the said Clark became entitled to have the said certificate representing said seven hundred thousand (700,000) shares delivered to him by these plaintiffs he would authorize, empower and instruct these plaintiffs to deliver the same to The Union Trust Company of Pittsburg, so that the said The Union Trust Company of Pittsburg might be made the holder of the said seven hundred thousand (700,000) shares for the use and benefit of and as trustee for the said Clark, and said divers other persons, in the proportions and parts which had been agreed upon between the said Clark and the said divers other persons."

The attorney's lien, which the plaintiffs claim and seek to foreclose in this action, is not one upon the whole of the 700,000 shares of stock awarded to the defendant Clark by the decree of the District Court of Wyoming, but only upon the interest of Clark in such shares which he, Clark, had and retained after he made the agreement mentioned in paragraph 9 of the complaint, above quoted.

The agreement was made for the purpose of securing the \$92,000 which was necessary to be paid into court before the 700,000 shares of stock could be recovered. The

necessity for the payment of the \$92,000, clearly appears from paragraph 5 of the complaint, above quoted, and admitted in the answer. As to the facts, material in this connection, the plaintiffs in error, in their brief, say: "The defendant Clark, not having himself personally sufficient money to pay the aforesaid amount, enlisted the co-operation of a number of other men who were more or less interested with him in the acquiring of said shares of stock, and among them the said sum of money was raised. For the purpose of raising this money, these men met in Pittsburg, Pennsylvania, * * * and discussed ways and means for providing the aforesaid sum to obtain the said certificate of stock. * * *" These parties entered into the agreement above mentioned. The result of the agreement was that Clark would have a twenty (20) per cent interest in the whole 700,000 shares, free and clear of cost or expense, other than attorneys' fees. This fact is not controverted. It is only this interest of Clark that is sought to be subjected to the attorney's lien.

It is admitted in the pleadings that on December 2, 1916, the plaintiffs were "in possession, for and on behalf of defendant (Clark), of a certificate for seven hundred thousand (700,000) shares of stock in The Mexico-Wyoming Petroleum Company, defendant, and * * * that the plaintiffs did transmit said certificate to the defendant, The Union Trust Company of Pittsburgh." This quotation is taken from the defendant Clark's answer.

The first controverted allegations of the complaint are those wherein the plaintiffs allege that they had a lien upon the whole of the 700,000 shares of stock at the time when they took the certificate therefor into their possession, receiving the same from the District Court of Wyoming. The complaint further alleges certain facts for the purpose of showing that the plaintiffs retained a lien upon the interest of the defendant Clark in the 700,000 shares of stock, at and after the time that the certificate was transmitted by them, the plaintiffs, to the defendant, The Union Trust Company. These allegations are denied generally. Other

matters in the pleadings are concerned with the amount of compensation which is due plaintiffs.

The trial court found all the issues in favor of the plaintiffs, "and that the equities of this cause are with the plaintiffs and not with the defendants, or any of them." The court decreed "that the plaintiffs do have and recover of and from the defendant, N. F. Clark, the sum of \$14,944.59 * * * and that the plaintiffs have and are entitled to a lien upon all and every right, title and interest in part and portion of the defendant Clark in 700,000 shares of the capital stock of the defendant, The Mexico-Wyoming Petroleum Company." It was further ordered that in default of the payment by Clark of the sum of \$14,944.59, that his rights and interests in the stock in question be sold. The defendants have sued out a writ of error, and the cause is before us upon their application for a supersedeas.

The first contention of the plaintiffs in error, defendants below, is that the plaintiffs had no lien upon the 700,000 shares of stock when the certificate for the same was first taken into their possession, or at any time. In this connection they say: "Plaintiff T. J. O'Donnell received said stock clothed with an express trust and he was acting for the Union Trust Company, trustee, when he got it." The plaintiffs in error endeavor to show that this case falls within the rule, mentioned in some authorities cited by them, which is stated in 6 C. J. 786, as follows: "An attorney has no lien on property placed in his hands for a special purpose under such circumstances that a trust arises which is inconsistent with, or adverse to, the claim of a lien." Under the facts disclosed by the record, there is no room for the application of the foregoing rule. The only answer that was filed in the case admits, specifically, that the plaintiffs came into possession of the stock "for and on behalf of the defendant Clark," and admits those allegations of the complaint to the effect that the certificates for such stock was in the possession of the plaintiffs "as attorneys for the said Clark." The evidence shows that the plaintiffs were acting as the attorneys for Clark when receiving the

certificate from the registry of the District Court of Wyoming, and not as messengers or agents of the Union Trust Company or any person other than Clark. The plaintiffs in error claim that the plaintiff O'Donnell received the certificate "solely under the terms" of the agreement between Clark and others, hereinbefore mentioned, and received it "for transmission and lodgment with said Trust Company." Assuming, without conceding, that the certificate was thus received by the plaintiffs, nothing was ever done or claimed by them which is inconsistent with what the defendants say was the "express trust" with which the plaintiffs received the certificate. The certificate that was issued and lodged in the registry of the District Court of Wyoming was issued and stood in the name of H. F. Clark. The agreement which Clark thereafter made with the persons who raised the necessary money with which to obtain the certificate, provided that the stock should "be transferred and assigned to and held in the name of" The Union Trust Company "as trustee for the benefit of the party of the first part (Clark)," and the parties who furnished the money, referred to in the agreement as "the parties of the second part." The plaintiffs never attempted, and do not now attempt, to assert any lien on the 700,000 shares of stock as a whole, or upon the interest of any of the parties to the above mentioned agreement other than the defendant Clark. Nothing was ever done by the plaintiffs to interfere with Clark's contract with his associates. On the other hand, the plaintiffs promptly forwarded the certificate to the Union Trust Company so that steps might be taken whereby the shares would be placed in the name of The Union Trust Company of Pittsburg, to be held by it as trustee for Clark and others, as provided in the agreement. The fair dealing of the plaintiffs, Clark's attorneys, in this respect, appears to have paved the way for a further contention, made in an effort to defeat the lien.

The further contention of the plaintiffs in error is that the "plaintiffs waived the lien", and the principal fact relied upon to support such a conclusion is stated in the brief

of the plaintiffs in error as follows: "Mr. O'Donnell sent the 700,000 shares of stock to The Union Trust Company, permitted the stock to go out of his hands, both by the settlement in the Trust Agreement and the surrendering of the same (the certificate of stock) to the Union Trust Company." It cannot be disputed that the 700,000 shares of stock in question were the fruits of the judgment which had been obtained through the services of the plaintiffs, and could be made subject to an attorney's lien. *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567. It is assumed in the briefs, and we will assume likewise, that the attorney's lien statute is the same in Wyoming as in Colorado. Under that statute an attorney may file a notice of his claim with the clerk of the court where the judgment is recovered, and such notice "shall be notice to all persons claiming by, through or under any person having obtained a judgment." Sec. 242, R. S. 1908. Such statutory notice is not made a prerequisite to the validity of the lien, but merely provides a way in which notice may be given, so that the lien may be preserved in the case. among others, that the fruits of the judgment come into the hands of some third party, but if such third party has actual notice, the statutory notice, as to such third party, is not necessary. A person having actual notice is in a better position to protect himself than if he merely had the constructive notice resulting from the filing of the statutory notice. The principal purpose of the statute, as to notice, is to protect innocent purchasers of the fruits of the judgment.

In the instant case The Union Trust Company had full and actual notice of the plaintiffs' attorney's lien at the time it received the certificate of stock for the 700,000 shares. The plaintiffs' letter to the Trust Company, which letter accompanied the certificate, recited the services which had been performed by the plaintiffs for Clark in procuring the shares, and continues: "For said services I and the said firm acquired a lien upon the fruits of the said judgment, and I desire to retain, hold and keep the said lien,

so far as the interests retained by the said Clark in the fruits of the said judgment is concerned, and against the same. * * *

"You are therefore hereby notified that in relinquishing possession of the said certificate for 700,000 shares, I do so upon the express understanding that you will take notice of the claim of lien for legal services above herein referred to, and so far as the interests and rights of the said Clark under the said agreement of October 31, 1916, are concerned, will not permit the same or any part thereof, or any dividends or interests in moneys arising therefrom, to be dealt with or pass from your hands, until the said lien and claim shall be discharged, and you notified thereof accordingly."

The evidence shows not only a notice to the Trust Company, as above seen, but also a notice to Clark and his associates that the plaintiffs claim their lien.

As before stated, the plaintiffs do not now assert a lien against the entire 700,000 shares of stock, but only against the defendant Clark's interests therein. In view of the facts hereinbefore stated, and particularly since the Trust Company received the shares, including Clark's interest therein, with notice of the plaintiffs' lien upon Clark's interest, there is no reason why the lien upon such interest cannot be enforced in this action, even though such interest is being held by the Trust Company, as trustee for Clark.

The Union Trust Company was one of the defendants below, appearing and filing a demurrer, which was overruled. It filed no answer. It is named as one of the plaintiffs in error here, but does not appear to have any cause for complaint against the decree below. Clark is the only real party in interest, among the plaintiffs in error. The decree does not, and cannot, injuriously affect any party other than Clark, since it is only the interest of Clark that is sought to be subjected to the lien. Clark is not in a position to complain that the plaintiffs did not establish their lien by the filing of some formal notice with the clerk of the court where the original action was pending, since

"as between attorney and client nothing need be done prior to its enforcement." *Fillmore v. Wells, supra*.

The trial court committed no error in holding and decreeing that plaintiffs had an attorney's lien upon Clark's interest in the stock in question.

A large part of the briefs filed on either side, is devoted to a discussion of the evidence as to whether or not, as alleged in the answer, it had been agreed between the defendant Clark and the plaintiffs that the latter "should receive the sum of \$10,000 in full payment and satisfaction" for the services rendered. In the matter of the amount of compensation, the action is brought upon a *quantum meruit*, the complaint alleging that the reasonable value of the services was \$25,000. There is no dispute as to such value, and it appears to be conceded that the services were worth that amount. The controversy relates to the alleged agreement. The issue was found for the plaintiffs. There is sufficient evidence to support the finding.

The plaintiffs in error further contend, without the citation of any authority, that there was no *res* within the state of Colorado, and that therefore the defendant Clark, who is a non-resident, could not be served with summons by publication. Aside from the fact that Clark appeared and filed an answer, which gave the court jurisdiction over his person, the subject matter of the suit was within the state. The shares of stock involved in this action are shares in a corporation created in this state. This is admitted in the pleadings. Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. 2 Cook on Corporations (6th ed.), section 485.

The application for a supersedeas is denied, and the judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9429.

MCCALLISTER v. SCHULTE.

PRACTICE IN ERROR—*Findings on Conflicting Evidence*, will not be disturbed.

*Error to Denver District Court, Hon. John I. Mullins,
Judge.*

Mr. H. A. HICKS, for plaintiff in error.

Mr. LUKE J. KAVANAUGH and Mr. CHARLES F. MORRIS,
for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error, in 1904, recovered a judgment against defendant in error, under which, in November, 1917, he caused a levy to be made upon property of the defendant in error. Thereupon the latter began suit for an injunction to prevent further proceedings under said levy. The ground of this action was that in 1905 the judgment was satisfied by the delivery to the judgment creditor of a piano in which defendant in error had an equity. The court found for the plaintiff and enjoined the enforcement of the judgment.

In several assignments of error this action of the court is presented for our consideration, the substance of them being that the findings are contrary to the evidence. There was a clear conflict of evidence, the defendant in error, his wife, and two disinterested witnesses testifying that a full settlement was made, and the plaintiff in error denying that the piano was taken in settlement of his judgment.

Under this state of facts we are not at liberty to disturb the findings. The judgment is, therefore, affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9740.

GODDARD v. STOCKTON.

EVIDENCE—Burden of Proof. The burden of proof is upon defendant to establish his affirmative defense contentions by a fair preponderance of the evidence.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Mr. JOHN T. JACOBS and Mr. J. H. BURKHARDT, for plaintiff in error.

Mr. CARLE WHITEHEAD and Mr. ALBERT VOGL, for defendant in error.

Department One.

Mr. Justice Burke delivered the opinion of the court.

THIS action was brought by defendant in error against plaintiff in error to recover the sum of \$700.00 as purchase price of an automobile, and \$100.00 borrowed money, together with interest thereon. The parties are herein-after designated as in the court below.

The allegations of the complaint are admitted and defendant alleges payment of the amount sued on by the transfer and delivery of certain stock of the Farm Machinery Company, at \$1.50 per share. He further alleges a transfer of such additional amount of stock as makes plaintiff indebted to him therefor in the sum of \$19,875.00, for which he asks judgment. All new matter contained in the answer and cross complaint is denied by the replication. The cause came on for trial by agreement before the court without a jury. At the close of defendant's evidence plaintiff's motion for a non-suit on defendant's counter claim was sustained by the court, and judgment entered in favor of plaintiff on his complaint and defendant's admissions, in the sum of \$831.00 and costs. To review this judgment defendant sued out a writ of error, and the cause is now before us on his application for supersedeas.

It appears from the evidence that certain of the stock of the Farm Machinery Company, a corporation, had been

issued to various individuals. It was the contention of the defendant that this stock was issued out of a block of stock of said corporation belonging to him and delivered at the instance and request of the plaintiff. The burden of proof was on defendant to so establish by a fair preponderance of the evidence. The record discloses that these disputed stock transactions were all in process of litigation in another action then pending, and the motion for non-suit was sustained without prejudice. The trial court found that the evidence introduced on behalf of defendant was so hazy, indefinite and unsatisfactory as to be entirely insufficient to justify a judgment in favor of defendant. We have examined the whole of this record with great care and find no reason to disagree with that conclusion. The supersedeas is denied and the judgment affirmed.

Garrigues, C. J. and Denison, J. concur.

No. 9639.

BROCK-HAFTNER PRESS CO. ET AL. v. INDUSTRIAL COMMISSION ET AL.

1. MASTER AND SERVANT—*Course of Employment.* Where the servant loses his life in an attempt to save a fellow servant from injury, he is acting within the course of his employment.
2. INDUSTRIAL COMMISSION—*Finding of,* if supported by the evidence must be accepted by the courts.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. WILLIAM E. HUTTON and Mr. B. B. MCCAY, for plaintiffs in error.

Hon. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Assistant, Mr. WAYNE C. WILLIAMS and Mr. H. E. CURRAN, of counsel, for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

THIS cause is before us to review a judgment of the District Court affirming an award made by the Industrial Commission in a proceeding before it in which defendants in error, Hoffman and Putnam were claimants for compensation. Said Hoffman, as grandmother, and Putnam as a minor brother of Edwin Putnam, who was killed on the premises of plaintiff in error, The Brock-Haffner Press Company, while in said company's employ, claimed to be dependent upon said deceased, and as such entitled to compensation under the statute. The Commission found that said Robert Putnam was wholly dependent upon said deceased brother, and that he was entitled to the compensation prescribed by the statute. On appeal to the District Court, it was held that the evidence did not show entire dependence by Robert Putnam upon the deceased, and the award was accordingly set aside. Upon further hearing before the Commission, it was found that Robert Putnam was eleven-twelfths dependent upon his deceased brother, and an award made to that effect. This award, on review of the District Court, was affirmed.

Plaintiffs in error contend that the evidence does not support either the finding of liability under the compensation act, or of eleven-twelfths dependence. While the evidence as to the former question leaves much to conjecture, it is nevertheless true that from it a reasonable man might draw the inference that deceased lost his life in attempting to save a fellow employe from injury in the factory, which act, under the authorities, was an accident arising out of and in the course of his employment. *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, and cases cited.

Upon the extent of the dependence also the evidence is such that from it an inference may reasonably be drawn which supports the findings. Under this state of facts, we are not called upon to weigh the evidence, but must accept the findings of the Commission.

The judgment is accordingly affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9486.

BOYD v. BOYD.

1. **DIVORCE**—*Action to Vacate*, upon the ground that the wife's appearance and answer were forgeries, and that she was never served with process, requires proof of the forgery beyond reasonable doubt.
2. —*Mercenary Motive*. To such action, instigated by a mercenary motive the doctrine of laches, estoppel and acquiescence prevails.

Where it appears that the wife knew of the decree before the second marriage of the husband, acquiesced in it for years, and accepted alimony under a contract which recited the decree, a judgment annulling the divorce was reversed.

3. *Practice in Error*—*Province of the Court of Review*, is to examine the entire evidence, and determine whether the trial court or jury misunderstood its force and effect.

Error to Arapahoe District Court, Hon. Robert G. Strong, Judge.

Mr. GEO. ALLAN SMITH, for plaintiff in error.

Mr. EDWARD M. SABIN, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

SEPTEMBER 7, 1911, Joseph W. Boyd, defendant below, plaintiff in error here, obtained a divorce from Nello May Boyd, defendant in error, and July 25, 1914, she brought this suit in equity to have the judgment pronounced void and the divorce decree annulled upon the alleged ground in her complaint that she had never been served with summons or notice, and that her signature to the answer, waiver of notice, acceptance of service and consent to trial were forged, and that she had no notice or knowledge that a divorce decree had been entered until about July 25, 1914. The lower court found the purported signatures were forgeries, pronounced the divorce decree void, and set it aside. We will speak of her here as plaintiff and him as defendant, the same as in the lower court.

The instruments to which the signatures are alleged to be forged are as follows:

Acceptance of Service on the back of the summons:

"State of Colorado,
City and County of Denver, } ss:

I do hereby certify that I have this day duly received a copy of the within summons, together with a copy of the complaint in the within stated action, thereunto attached, and I hereby acknowledge receipt of the same and waive the service hereof by an officer.

Witness my hand and seal this 7th day of September,
A. D. 1911.

NELLO MAY BOYD,
Defendant."

ACKNOWLEDGMENT.

"State of Colorado,
City and County of Denver, } ss:

NELLO MAY BOYD being first duly sworn, says, that she is the defendant in the within entitled cause; that she knows the purport of the within summons and the complaint in said action, a copy of which she has received; that she is the same person who signed the above acknowledgment of the receipt of a copy of the summons and complaint in the within stated action.

NELLO MAY BOYD.

Subscribed and sworn to before me, this 7th day of September, A. D. 1911.

My commission expires March 6, 1915.

(Notarial Seal)

OLGA JACOBSON,
Notary Public."

ANSWER.

"State of Colorado,
County of Arapahoe,

} ss:

In the County Court.

JOSEPH W. BOYD,
Plaintiff,

vs.

NELLO MAY BOYD,
Defendant.

Answer and Waiver of Trial
Notice.

Comes now the defendant in the above entitled cause and answering the complaint filed herein, says:

Defendant admits the amount involved, the residence, the marriage, and that there is no issue of said marriage.

Defendant denies each and every other allegation in said complaint contained.

Wherefore, Defendant prays that the said complaint be dismissed and for such other and further relief as to the court may seem meet.

Defendant waives notice of trial, and waives the statutory time for the trial of said cause and consents that said cause may be tried at any time convenient to the court without further notice to the said defendant.

NELLO MAY BOYD.',

ACKNOWLEDGMENT.

"State of Colorado,
City and County of Denver,

} ss:

NELLO MAY BOYD, being first duly sworn, deposes and says: That she is the defendant in the above entitled cause; that she has read the above and foregoing answer, and waiver of trial notice, knows the contents thereof, and knows that the same is true of her own knowledge.

NELLO MAY BOYD,
Defendant.

Subscribed and sworn to before me this 7th day of September, A. D. 1911.

My commission expires March 6, 1915.

(Notarial Seal) OLGA JACOBSON,
Notary Public.

The divorce decree was entered September 7, 1911, and plaintiff and defendant each signed an alimony agreement or contract dated September 7, 1911, which recites that, whereas they have been separated by a decree of court which makes no provision for alimony or her future support and maintenance; therefore, he being desirous of making some provision for her future support, it is mutually agreed between them, that he will, from and after September 7, 1911, pay her in lieu of alimony \$365.00 per annum to be continued until her remarriage or death; provided that he may at any time pay her \$5,000.00 and be released from any claim by her for alimony, and provided further that he shall be under no obligation to pay the \$5,000.00 unless he receives that amount from the settlement of a certain law suit, and then only in the event that she is not remarried and is still living. All household furniture in her possession is to be her absolute property. The covenants to be performed by him shall be in full settlement of both temporary and permanent alimony, or of any other claim that she might have against him by virtue of their being husband and wife. The life insurance of each to stand as it is at the time of making the contract.

In her sworn replication plaintiff states that she signed this alimony agreement sometime in September, 1911.

October 12, 1911, she made, subscribed and acknowledged before a notary a purported will which provides *inter alia* that "all personal property I may own, clothing, household goods, bedding, and all cash I may own to be paid to my divorced husband, Joseph W. Boyd, at the time of my death."

December 11, 1911, Mr. Boyd married one Josephine Elliott in the Territory of New Mexico, and they immediately returned to Denver where they have since resided. The year following the marriage a child was born to them who is now living and past 7 years of age.

Garrigues, C. J., after stating the case as above.

To sustain this action upon the ground of forgery the evidence considered as a whole must show the forgery beyond a reasonable doubt. To set the divorce decree aside upon this point, the evidence must measure up to the high degree of proof required to cancel written instruments. We have carefully examined the whole evidence and find it comes far short of this requirement. Bearing upon, and illustrating this point, we cite the following authorities: *Armour v. Spalding*, 14 Colo. 302, 23 Pac. 789; *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70; *Enos v. Anderson*, 40 Colo. 395, 398, 93 Pac. 475, 15 L. R. A. (N. S.) 1087; *Butsch v. Smith*, 40 Colo. 64, 90 Pac. 61; *Mitchell v. Mitchell*, 41 Colo. 72, 74, 91 Pac. 1103; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Kavanagh v. Hamilton*, 53 Colo. 157, 168, 125 Pac. 512, Ann. Cas. 1914E, 76; *Pinnacle Co. v. Popst*, 54 Colo. 451, 462, 131 Pac. 413; *Martinez v. Martinez*, 57 Colo. 292, 298, 141 Pac. 469; *James v. Aspelin*, 57 Colo. 381, 383, 141 Pac. 993; *Irvine v. Minshull*, 60 Colo. 112, 140, 152 Pac. 1150; *Wilson v. Morris*, 4 Colo. App. 242, 245, 36 Pac. 248; *Davis v. Dresback*, 81 Ill. 393; *Northwestern & Pac. Hypotheek Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139; *Huntington v. Crouter*, 33 Or. 408, 54 Pac. 208, 72 Am. St. Rep. 726.

[2] It is the province of a court of review to examine the entire evidence and determine whether the trial court or jury misconceived its force and effect. *People v. Court of Appeals*, 24 Colo. 186, 187, 49 Pac. 36; *Laesch v. Morton*, 38 Colo. 171, 174, 87 Pac. 1081, 120 Am. St. Rep. 106; *Thuringer v. Trafton*, 58 Colo. 250, 254, 144 Pac. 866; *Fulton Co. v. Smith*, 27 Colo. App. 279, 286, 149 Pac. 444.

There is another reason why the case should be reversed. The evidence shows the plaintiff brought the suit from mercenary motives for the purpose of subjecting defendant to her monetary demands. Motive is immaterial in a suit involving property rights only, but in an action to set aside a divorce where there has been a remarriage, something more than property rights is involved; conscience, good faith, honesty of purpose and reasonable diligence are required, and the doctrine of laches, estoppel and acquiescence prevails. *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; *Arthur v. Israel*, 15 Colo. 147, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381; *Israel v. Arthur*, 18 Colo. 158, 32 Pac. 68; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824; *Du Bois v. Clark*, 12 Colo. App. 221, 55 Pac. 750; *Keely v. East Side Imp. Co.*, 16 Colo. App. 365, 371, 65 Pac. 456; 14 Cyc. 720; *Nichols v. Nichols*, 25 N. J. Eq. 60, 66; *Singer v. Singer*, 41 Barb. (N. Y.) 139, 140; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223; Bispham's Princ. of Eq., § 39; *McNeil v. McNeil* (C. C.), 78 Fed. 834; *McNeil v. McNeil*, 170 Fed. 289, 291, 95 C. C. A. 485; *Maher v. Title Guarantee & Trust Co.*, 95 Ill. App. 365, 368, 389.

We purposely omit a statement of the evidence, or any comments upon it, further than to say that we have read and considered it all carefully and find from an examination of the whole record that a court of review would not be warranted in allowing a judgment to stand based upon the theory that the evidence shows beyond a reasonable doubt that plaintiff's name was forged to the county court papers in the divorce action. Upon the second proposition, eliminating entirely the question of acceptance of service,

the evidence shows that plaintiff knew of the decree as early as September, or at least in October, before the defendant remarried in December, 1911. It further shows overwhelmingly that she acquiesced in the decree and accepted alimony under the contract until the bringing of this suit July 25, 1914. In the face of such a record, any finding by a trial court that plaintiff used reasonable diligence, that she was not actuated from mercenary motives, that she was moved by conscience, good faith and honesty of purpose, and that the doctrine of laches, estoppel and acquiescence did not apply, would not be binding upon this court because it would lack substantial support from the evidence. We therefore reverse and remand the case with directions to the lower court to dismiss it.

Judgment Reversed and Remanded.

Mr. Justice Scott and Mr. Justice Denison concur.

No. 9550.

GALLOVICH v. THE PEOPLE.

1. CONSTITUTIONAL LAW—*Legislative Power*. It is clearly within the power of the state to prohibit the manufacture and sale of intoxicating liquors, and to adopt any reasonable regulations necessary to make the prohibition effective.

The possession of intoxicating liquors in public or semi-public places may be prohibited, as an aid to the enforcement of the statute against traffic in such liquors.

The final provisions of sec. I of c. 82 of the Laws of 1917 sustained as within the legislative power.

The provisions of the enactment are sufficiently expressed in the title.

2. MAXIMS—*Expressio Unius Exclusio Alterius*, is not a fixed and unalterable rule, nor is it in high favor, nor of universal application, as a rule of constitutional construction.

Error to Las Animas District Court, Hon. A. C. McChesney, Judge.

Mr. JESSE E. NORTHCUTT, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. CHARLES ROACH, Deputy, for The People.

Mr. Justice Bailey delivered the opinion of the court.

THE case is here on writ of error to the District Court of Las Animas County. The defendant was convicted of unlawfully keeping intoxicating liquor in the basement of his restaurant and soft drink parlor. It appears that this was his second conviction, and he was accordingly sentenced to imprisonment in the penitentiary at hard labor for not less than one year.

Numerous errors have been assigned, but the one chiefly relied upon is that the section under which the defendant was tried and convicted is unconstitutional and therefore void. That portion of the statute involved, Session Laws of 1917, page 283, is as follows: "It shall be unlawful for any person to have, keep or use intoxicating liquors in any store, shop, club, roadhouse, railroad car, place of private business or place of public resort, or in any room or rooms of any hotel, rooming house or boarding house or in any part or parts of any building directly or indirectly connected with any such place, or in any place except in his home or except while carrying same with the permit herein provided for thereto securely fastened; it shall be unlawful for any person in this state to manufacture intoxicating liquor for any purpose whatsoever."

It is contended that article XXII of the Constitution, relative to intoxicating liquors, is not a grant of power to legislate upon that subject, but is a limitation upon the authority of the legislature to deal with the prohibition of the liquor traffic. Article XXII is as follows: "From and after the first (1st) day of January, 1916, no person association or corporation shall, within this state, manufacture for sale or gift any intoxicating liquors; and no person, association or corporation shall import into this state any intoxicating liquors for sale or gift; and no person, association or corporation shall, within this state, sell

or keep for sale any intoxicating liquors or offer any intoxicating liquors for sale, barter or trade; *Provided, however,* That the handling of intoxicating liquors for medicinal or sacramental purposes may be provided for by statute.

Sec. 2. All provisions of the Constitution in conflict herewith are hereby repealed."

In substance it is urged by defendant that the Constitution having prohibited the traffic in intoxicating liquors except for certain specific purposes, the legislature is prohibited from legislating against its possession by private individuals for personal use. It seems, however, that in so far as the state Constitution is concerned, that such possession, when held in public or semi-public places, may well be prohibited as an aid to the enforcement of the statutes against the traffic itself.

This question was passed upon, in substance and effect, in *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92. In that case the constitutionality of certain local option laws was questioned, and it was urged that inasmuch as the Constitution directed the legislature to prohibit the introduction and sale of impure and spurious intoxicating liquor into the state, it by necessary implication inhibited any legislation as to traffic in pure liquors. In other words, the contention there, as here, was that the terms of the Constitution were in the nature of a limitation of power on the subject, and not a grant of power. In speaking to this question in that case this court said, at page 252: "Although urged from many view points, and presented in various phases, with great ability, research and learning, and involving numerous incidental questions, the contention rests chiefly upon the application of the doctrine, to the facts of the case at bar, that a general grant of legislative authority in the constitution is limited and qualified by subsequent special affirmative provisions therein relative to a particular subject matter. This contention is in effect an elaboration of the legal maxim that 'A specification of particulars is an exclusion of generals,' or 'the ex-

pression of one thing is the exclusion of another.' In other words it is said that when the constitution conferred the *special* power and enjoined the *special* duty upon the legislature to prohibit the importation, manufacture and sale of *spurious* and *impure* liquors, but remained silent as to the prohibition, manufacture and sale of *pure* liquors, that such affirmative declaration must be construed as implying the negative as to the legislative power by law to prohibit traffic in the latter kind."

It is this theory of interpretation which the objectors urged in the Schwartz case that the defendant relies upon in this case, when he argues in substance that because the Constitution prohibits the barter and sale of intoxicating liquors the legislature has no power to regulate the possession thereof by individuals for personal use.

In pointing out the fallacy of this contention in the Schwartz case, the court at page 252 declares: "With reference to the rule of interpretation, which forms the groundwork, and is the very gist, of the argument of counsel for plaintiff in error, that 'The expression of the one is the exclusion of the other,' it may be fairly said that it is in no sense a fixed and unalterable rule, to be applied in every case where ingenious counsel may deem it applicable, and may be in need of its helpful agency to attain the end sought; neither is it in high favor as a rule of constitutional construction nor of universal application."

The court then quotes at length from Story on the Constitution, sec. 448, and from *People ex rel. Livesay v. Wright*, 6 Colo. 92, and *Orahood v. Denver*, 41 Colo. 175, 91 Pac. 1116. Again referring to the question as to whether an affirmative section limited the legislative powers, the court continued, at page 270, where *Alexander v. People*, 7 Colo. 155, 2 Pac. 894, is quoted with approval, and said: "So here, read in the light of the foregoing rule of interpretation and fixed policy of both the state and territory from the beginning, to control, regulate, license and absolutely prohibit the sale of *every kind* of intoxicating liquors, when and where deemed necessary, for the

common good, this provision of our Constitution is clearly mandatory, and confined to *impure* liquors only, requiring affirmative action on the part of the legislature to the extent and in the manner specified, and is, in no measure, prohibitory, or a limitation of its powers to legislate upon the subject of *pure* liquors in any manner which it believes wise and beneficial."

It is clearly within the power of the state to prohibit the manufacture and sale of intoxicating liquors. It necessarily follows, therefore, that the state has power to adopt such reasonable laws as may be necessary to make such prohibition effective. *Crane v. Campbell*, 245 U. S. 304, 62 L. Ed. 304, 38 Sup. Ct. 98. It is manifest that the statute in question is a reasonable and appropriate means for such purpose.

It is admitted that the state, in the proper exercise of its police powers, may prohibit the traffic in intoxicating liquors. Any regulation having reasonable relation to that end may also be adopted, in order to make the prohibition effective. The position assumed by defendant that the mandate of the Constitution against manufacturing and trafficking in intoxicating liquors restrains the legislature from going beyond such express powers is untenable in view of the rule laid down in the *Schwartz* case, *supra*, which rule should be applied to the case at bar.

In *Fitch v. State*, 102 Neb. 361, 167 N. W. 417, the court had under consideration a constitutional amendment similar to the one here involved, and in determining that the statute did not transcend the power of the legislature the court at page 368 said: "The state having adopted a constitutional amendment forbidding the traffic in liquor, it was left to the legislature to devise a plan to successfully put that policy into operation. In forbidding the keeping of intoxicating liquors at any other place than a private dwelling house, the lawmakers were not attempting to make class distinctions, and, inasmuch as no person is forbidden by the law to own or occupy a private dwelling house, it did not do so. We have only to consider whether

this limitation upon the possession of liquor, even when not held for an unlawful purpose, is a reasonable one. It is idle to forbid the traffic in intoxicants and yet fail to provide an adequate method of enforcing the prohibition. It is common knowledge that officers of the law find it difficult to enforce prohibitory measures. If parties are free to keep quantities of intoxicating liquor in rooms, offices and buildings other than private dwelling houses, the work of the police officers is that much more difficult. 'It is also well established that, when a state, exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary, in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.' "

It is also contended that the statute upon which the conviction was based is in violation of section 21 of article V, of the Constitution, which provides that no bills except general appropriation bills shall be passed which contain more than one subject, which shall be clearly expressed in the title; and also that it is repugnant to section 24 of the same article, which provides that no law shall be revived, or its provisions conferred, extended or amended, except by publishing at length the portion so affected. It was determined in *Colorado F. L. & S. Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443, that a title to an original act is sufficient if it embraces the matter covered by the provisions of the amendatory act. There can be no question that the sections herein involved come well within the rule. The amendment to section 7 is in no sense such an extension or revival of the original act as to bring it within the purview of section 24 of the Constitution, and these specific objections are therefore without merit.

It is not necessary to consider any of the other assign-

ments of error, as a careful reading of the record discloses nothing which would justify a reversal of the judgment, and it is accordingly affirmed.

Judgment Affirmed.

Decision en banc.

No. 9559. No. 9565.

PIERCE & ZAHN BOOK CO. v. INTERNATIONAL TEXT BOOK CO.

PRATT MERCANTILE & PUBLISHING CO. v. INTERNATIONAL TEXT BOOK CO.

TRIAL—*Directing Verdict, Disregarding Former Opinion of This Court.*

Where the District Court directs a verdict for the defendant, the evidence being substantially the same as examined upon the former writ of error, in which it was held that the issues must be left to the jury, the judgment is reversed.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. JOHN R. SMITH and Mr. H. B. WOODS, for plaintiffs in error.

Messrs. ROGERS, ELLIS & JOHNSON and Mr. ERL H. ELLIS, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THESE two cases were consolidated for trial and will be considered together. The defendant in error brought an action in the County Court against the plaintiff in error, in each case, to recover certain text books bought by the defendants in the actions from sundry persons to whom, it is alleged, these books had been loaned by the plaintiff in the case. The court directed a verdict for the defendants and the plaintiff brought the causes here on error. This court held that the evidence was such as to require that the case be submitted to a jury; and reversed the judgment. *International Co. v. Pierce & Zahn*, 61 Colo.

574, 158 Pac. 714. The causes were tried again in the County Court and verdict and judgment were in favor of the defendants, plaintiffs in error here.

On an appeal to the District Court, a trial was had, the plaintiff presenting in evidence only the depositions used on the first trial in the County Court. The evidence on behalf of the defendants was substantially the same as on the former trial which we reviewed as above stated. The District Court directed a verdict in favor of plaintiffs, and judgment was entered accordingly. The defendants bring the case here on error. They allege that the District Court failed to follow the rule laid down in the case mentioned and therefore insist that the cause should be again reversed.

Inasmuch as we held in the case mentioned that the evidence should have been submitted to the jury, and the evidence on this trial is substantially the same as on that, we are of the opinion that the contention of the plaintiffs in error is correct. In this record, as in the other case, there are matters which the jury should determine. That reasonable persons might draw different inferences from the evidence appears from the fact that on the last trial in the County Court, the jury found the facts directly opposite to the views expressed by the trial judge in the District Court.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9578.

THE QUINTET MINING CO. ET AL v B. P. HARDIE.

Error to El Paso District Court, Hon. John W. Sheafor, Judge.

Mr. GEORGE C. MANLY and Mr. THEODORE H. THOMAS, for plaintiffs in error.

Messrs. SPURGEON & CASSIDY, and BARNWELL S. STUART, for defendants in error.

PER CURIAM: We have examined the record in this case with the utmost care and find that the decree rendered is not only equitable and just, but strictly in accord with the legal rights of the parties, and we are likewise of opinion that such decree, considered in connection with the record, affords ample protection to the defendants below, plaintiffs in error here, against the claim or claims of any third person or persons upon the stock herein involved.

The cause having been determined according to not only the equitable but the legal rights of the parties, the judgment should be affirmed.

Judgment affirmed.

April Term, 1920

No. 9755.

JASPER ET AL. v. BICKNELL.

1. **EVIDENCE—Witness—Competency.** Under Rev. Stat. sec. 7274 it is error to compel both husband and wife to testify, against their objection, in a cause seeking to impeach a conveyance by one to the other, as fraudulent against creditors.
2. **TRIAL—Re-examination of Witness.** It is error to deny to a party the right to re-examine his witness after cross-examination.
3. —*Exhibit not Identified as Authentic.* Bill to cancel a conveyance of husband to wife as fraudulent as against creditors. The husband was examined as to a paper designated as a Transcript of Testimony given by him before the referee in bankruptcy, and the transcript itself was offered and received in evidence. Not being in any way authenticated it was held incompetent, and its admission error.
4. **HOMESTEAD ENTRY—By Wife.** Where husband and wife reside on land the title to which is in the wife, she may make the claim of homestead required by Rev. Stat. Sec. 2951.
5. **PRACTICE—Defense Not Pleaded,** cannot be asserted or considered.

Error to Jefferson District Court, Hon. Samuel W. Johnson, Judge.

Mr. GEORGE B. CAMPBELL, for plaintiffs in error.

Messrs. QUAINANCE, KING & QUAINANCE and Mr. JOHN T. MALEY, for defendant in error.

Department One.

Mr. Justice Burke delivered the opinion of the court.

THIS was an equitable action in aid of execution and was brought by defendant in error against plaintiffs in error who are husband and wife. The parties are hereinafter designated as in the court below.

Plaintiff had obtained a judgment against defendant Henry Jasper and caused a transcript of the docket entry thereof to be filed in the office of the County Clerk and Recorder. Execution was issued and levy made upon the interest of Henry Jasper in the real estate here in question, consisting of twenty-eight acres, standing of record in the name of the wife. The amended complaint alleges that Henry Jasper was the owner of this property, the title to which he had caused to be placed in the name of his wife with the intent on the part of both to hinder, delay and defraud creditors, and particularly the plaintiff; that the transaction was without consideration; and that Henry Jasper was at the time insolvent. Defendants demurred on the grounds that the complaint was ambiguous, unintelligible and uncertain and did not state facts sufficient to constitute a cause of action. This demurrer was overruled and defendants answered denying the material allegations of the complaint. Trial was had to the court and judgment entered for plaintiff. The real estate was decreed to be the property of Henry Jasper and subject to the lien of plaintiff's judgment. It was further ordered that Minnie Jasper deposit with the clerk of the court a deed quit-claiming all her interest in said property to her husband. To review this judgment defendants sued out a writ of error and the cause is now before us on their application for a supersedeas.

Burke, J., after stating the case as above.

Numerous alleged errors are assigned but we find it necessary to consider only those going to the competency of the evidence, assuming that that evidence, if properly before the court, was sufficient to support the judgment.

Sec. 7284, R. S., 1908, provides: "A party to the record of any civil action or proceeding, * * * may be examined upon the trial thereof, as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, * * * ." Each of the defendants was called under this statute and each objected to such

examination, claiming exemption therefrom under the provisions of Par. 1, Sec. 7274, R. S., 1908, which reads: "A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during the marriage;" This objection was overruled and that ruling constitutes reversible error. *Frankenthal et al v. Solomonson*, 20 Wash. 460, 55 Pac. 754, 44 L. R. A. 311, 72 Am. St. Rep. 116; *In re Jefferson* (Wash.), 96 Fed. 826.

At the close of this cross-examination under the statute counsel for defendants sought to interrogate his clients and the court sustained an objection thereto. This was error. *Merritt v. Hummer*, 21 Colo. App. 568, 122 Pac. 816. In that case the error was held not prejudicial for the reason "that defendant was later called to the stand and examined fully by his counsel upon the matters brought out by counsel for plaintiff when he was first examined." The record before us does not disclose such an examination. The rule laid down by the court of appeals in the *Merritt* case was recognized by this court in *Western Investment and Land Co. v. First Nat. Bank of Denver*, 64 Colo. 37, 172 Pac. 6, 8, wherein it is said: "Under our practice a witness thus called may be examined by both sides."

An important part of the statutory cross-examination of defendant, Henry Jasper, related to testimony presumably theretofore given by him before a referee in bankruptcy, and the examination was conducted from an alleged transcript of that testimony. This transcript was afterward admitted in evidence over the objection of defendant and with the avowed purpose of impeaching him. That there had been such a bankruptcy proceeding in which defendant testified was undisputed, but no evidence was adduced of the identity or authenticity of the exhibit. It was therefore entirely incompetent and must have been prejudicial.

Minnie Jasper obtained title to eighteen acres of the land in question by deed from Maude Moore, and to the re-

maining ten acres by deed from Mary Fitzpatrick. Upon the margin of her record title to each tract she had caused a "homestead" entry to be made. "Every householder in the State of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation, entered into or incurred after the first day of February, in the year of our Lord one thousand eight hundred and sixty-eight." Sec. 2950, R. S. 1908. "To entitle any person to the benefit of this act he shall cause the word "Homestead" to be entered in the margin of his record title to the same, which marginal entry shall be signed by the owner making such entry * * * ; In case the husband is the owner of said homestead, the wife may cause such entry to be made and recorded, and the signature of the said entry by the wife shall have the same effect as if entered by the husband, the owner of the property." Sec. 2951, R. S., 1908. The making of this "Homestead" entry, and the fact that since obtaining title to the property she and her husband had resided thereon, were set up in the answer of defendants; were not denied by the plaintiff, and are established by the evidence. Under no circumstances could plaintiff be decreed relief as to the real estate in question to which she would not have been entitled had the property in fact stood in the name of Henry Jasper. Under such circumstances the homestead entry of the wife would have reserved the same from sale under execution to the extent of the valuation provided in sec. 2950, *supra*, and that reservation the court could not oblige her to relinquish by quit-claim for the benefit of the creditors of her husband.

In view of the possible re-trial of this cause it seems advisable to notice an additional assignment. It was contended by defendants below, and is urged here, that recovery by plaintiff is precluded under the provisions of our three year statute of limitations. "Bills for relief, on the ground of fraud, shall be filed within three years after the discovery by the aggrieved party, of the facts constituting

such fraud, and not afterwards." Sec. 4072, R. S., 1908. Defendants have filed no pleading in this cause under which they may take advantage of this statute. "The objection that an action is barred by the Statute of Limitations can not be raised by general demurrer, nor is it available under a general denial. It must be specially pleaded in the answer, or when it appears on the face of the complaint that the action is barred it may be pleaded by special demurrer. If it is not pleaded one way or the other, it is deemed waived." *Yost v. Irwin*, 53 Colo. 269, 270, 125 Pac. 526. The bar of the statute does not appear on the face of the complaint. It could not therefore be raised by demurrer, and was not specially pleaded in the answer. It is true that the statute of limitations under consideration in the *Yost* case was not the statute here in question but the language is the same and no reason appears why the construction of the one should not be applied to the other. A careful examination of the Colorado authorities construing Sec. 4072, *supra*, discloses nothing in derogation of the application of this rule.

For the errors heretofore noted the judgment is reversed and the cause remanded.

Garrigues, C. J., and Teller, J., concur.

No. 9421.

GOLDEN EAGLE DRY GOODS Co. v. MOCKBEE.

1. RULES OF THE ROAD—*Cities*. The rules of the Road in Cities require every vehicle to travel on the right hand side.
2. AUTO CARS—*Duty of driver at street intersection*. It is the duty of every driver of an auto car, when approaching a street intersection, to use reasonable care to see whether there is likelihood of a collision with a car approaching from the right, and if there is, to yield to it the right of way, and to keep his car under such control that he can do so.

The one having the right of way is not absolved from reasonable care, and the driver not having the right of way is entitled to assume that the car approaching from the right is not driving at a negligent rate.

3. EVIDENCE—*Judicial notice taken*, that in ordinary prudent driving it is impossible for an auto car to stop in its own length.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

En Banc.

Messrs. BARDWELL, HECOX, MCCOMB & STRONG, for plaintiff in error.

Messrs. GILLETTE & CLARK, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

DEFENDANT in error had a judgment against plaintiff in error for injuries sustained in an automobile collision caused by the alleged negligence of defendant's servant.

Plaintiff was driving an automobile southward on South University street in Denver. As she was crossing the intersection of East Evans street a motor-delivery car of the defendant, driven eastward by defendant's servant, collided with plaintiff's car and injured her.

The complaint alleged that the defendant's car was driven in a careless, negligent and reckless manner, and at an excessive and dangerous rate of speed, whereby the collision occurred.

The answer denied the negligence and excessive speed, and charged the plaintiff with excessive speed, and with taking the right of way from defendant.

Section 1974 of Denver Municipal Code provides that "Every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from the right,
* * *" The court instructed the jury, among other

things, as follows: "If both the plaintiff and the defendant's driver reached the intersection of the two streets at the same time, or if the defendant's driver reached the intersection first, the defendant's driver had the right of way. If the plaintiff reached the intersection of the two streets first, the plaintiff had the right of way. * * * It was the plaintiff's duty in approaching the intersection, to look to the right to see whether any vehicle was approaching the intersection from that direction, and to so keep her automobile under control as to enable her to accord the right of way to the defendant's driver, if he reached the intersection before the plaintiff reached the intersection, or at the same time that the plaintiff reached it." "It was the duty of the defendant's driver, in approaching the intersection, to look to the left to see whether any vehicle was approaching the intersection from that direction, and to so keep his automobile under control as to enable him to accord the right of way to the plaintiff, if she reached the intersection before he reached the intersection." This instruction is erroneous because it repeals the ordinance and because it is impracticable.

It repeals the ordinance or rather inverts it, because, since the rules of the road in cities require every vehicle to travel on the right hand side, the right hand car, when both are at or near the border of the street intersection, will be much nearer the intersection of the tracks of the two cars, the point of possible collision, than the left hand car will be; it follows that whenever the two cars are approaching at equal or nearly equal distances from that point (which is the only time when collision is likely) the right hand car must yield because the left hand car will reach the street intersection first; thus the right of way, in practically all cases, except where no collision could occur anyway, is transferred from the right to the left.

If the left hand car were running close to the curb, we might have, in an extreme case, the right hand car required to stop two or three feet from the point of possible collision to yield the right of way to the other, which is then perhaps thirty or even sixty feet away.

The instruction is impracticable, because, in many cases, in which collision is likely, when the two machines are near enough to know that they will reach the street intersection simultaneously, it is too late to consider the question of right of way.

When the cars are about to reach the street intersection at the same time, the right hand car must, under the instruction, in ordinary cases, stop in about its own length—in ordinary prudent driving an impossibility.

Again, the instruction requires every driver to look both right and left to see whether any of the cars on either side will touch the street intersection before or with him; an impracticable task.

We think the right rule is that it is the duty of every driver, when approaching a street intersection, to use reasonable care to see whether there is likelihood of collision with any car approaching from the right, and, if there is, to yield to it the right of way, and to keep his car under such control that he can do so. *Livingston v. Barney*, 62 Colo. 528, 163 Pac. 863; *Colo. etc. Ry. Co. v. Cohun*, 66 Colo. 149, 180 Pac. 307. The court below was clearly right, however, in warning the jury that the one having the right of way is not absolved from reasonable care, and we think that the driver who has not the right of way is entitled to assume that the car on his right is not approaching at a negligent rate.

Cases are cited in support of the rule stated in the instruction but we regard them as inconsistent with the ordinance, and with the decisions of this court above cited, and the rule seems to us as inconsistent with modern conditions as is the old common law rule that no vehicle might stand in a street.

The judgment should be reversed and new trial granted.

Allen, J., dissents.

No. 9589.

BROWN ET AL. v. HALLETT.

LANDLORD AND TENANT—Surrender. A lease provided that the tenant might assign to a corporation of which he was a member. The purpose of the transaction was to secure the premises for a corporation to be afterwards organized, the nominal lessee having no interest. The corporation was organized and the tenant, without assuming possession, immediately assigned to it, and the corporation occupied the premises and for a time paid rent.

Held sufficient to justify the court below in declaring that there was a surrender by the lessee, and an acceptance of a new tenant by the lessor.

The question whether there was a surrender, and a release of the original lessee held one of fact.

Error to Denver County Court, Hon. Ira C. Rothgerber, Judge.

Department 2.

Mr. JOHN F. TOURTELLOTTE, for plaintiffs in error.

Mr. H. W. DANFORTH, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

BROWN, executor, sued Hallett for rent, upon a lease from Anna Brown, deceased, to Hallett. The trial was to the court. The defendant had judgment.

There were no pleadings, the case being appealed from justice of the peace. The lease in question was in ordinary form with the ordinary covenant to pay rent and not to sublet or assign without the consent of the lessor, but there was a rider as follows: "It is mutually agreed that the lessee may assign his interest in this lease to a corporation of which he is a member." There was also an agreement that the covenants should be binding upon the heirs, executors, administrators and assigns of both parties.

At the trial the defendant was allowed to show that the purpose and intention of the lessee in taking the lease was for the use of a corporation to be formed; that the corpora-

tion would not be formed unless the lease could be obtained; that it was the lessee's intention immediately to assign the lease to this corporation; that these purposes and intentions were made known to the lessor. Indeed the purpose to form a corporation for the purpose of taking over the lease was mentioned before anything was said about the name of the lessee, or that there would be an intermediate lessee; and that at the last the lessee stated that he was not interested in the matter individually; that he was only acting for the company, and if the lease could properly be secured the company would be formed—otherwise not. This evidence was objected to by the plaintiff—the objection overruled *pro forma*, but the ruling was confirmed at the end of the trial and exception taken.

The lease was finally delivered May 27, 1915. On the next day the corporation was formed, accepted an assignment of the lease from Hallett, and went into immediate possession. Hallett, the lessee, was never in possession but was a member of the corporation.

The corporation paid the rent, performed all the duties of the tenant under the lease. In November, 1917, having become embarrassed, it went out of business and offered to surrender the lease to the lessor. The offer was refused and suit was brought against Hallett for rent.

The defendant relies upon three defenses but we need consider only the third which was, that all of the circumstances leading to and attending the execution of the lease, taken with the course of dealings after the assignment effect and prove a surrender of the lease and term by Hallett and a substitution of the assignee as tenant, so that he is no longer chargeable.

It is very true that the assignment of a lease is not a surrender, and does not relieve the lessee from his covenant to pay rent even though rent be accepted from the assignee (*Jones v. Barnes*, 45 Mo. App. 590, 593-4), but the question whether there was a surrender and a substitution of tenants and a release of the original lessee is one of fact, *Golding v. Brennan*, 183 Mass. 286, 289, 67 N. E. 239; *Colton v. Gor-*

ham, 72 Iowa 324, 33 N. W. 76; *Logan v. Anderson*, 2 Doug. (Mich.) 100; *Gomprecht v. Ludwig*, 120 N. Y. S. 986 (the concurring opinion is the majority opinion). When the whole purpose of the transaction is to get the leased premises for the use and benefit of the assignee, the negotiation being in inception for its benefit and the lease secured for that purpose only, with no individual interest in the lessee; when the transfer is made and accepted by the lessor no one having been in possession except the assignee, and rent is received from it and no one else it would seem that there was evidence sufficient to justify the court below in finding that there was a surrender by the lessee and an acceptance of a new tenant by the lessor.

Since there were no special findings, we must assume that this question of fact was resolved by the court for defendant. The evidence was admissible for the purpose of showing this fact and consequently the judgment must be affirmed.

Garrigues, C. J., and Scott, J., concur.

Decided March 1, A. D. 1920. Rehearing denied June 7, A. D. 1920.

No. 9601.

INTERSTATE BUSINESS EXCHANGE v. CITY AND COUNTY OF DENVER.

1. **EMPLOYMENT AGENCY**, *furnishing technically trained employes*, is not subject to police regulation as are those supplying common labor. *Wilson v. Denver*, 176 Pac. 17 followed.
2. — **License Tax**. A city may impose a license tax upon such agency, in spite of the imposition of a like tax by the state. *Provident Loan Society v. Denver*, 172 Pac. 10 followed.
3. — **Interstate Business**. A society which furnishes such employes to those without the state is not entitled to the protection of the statutes regulating interstate commerce where this is not its exclusive business.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. JOHN HIPPI and Mr. GEORGE MARRS, for plaintiff in error.

Mr. JAMES A. MARSH and Mr. JACOB J. LIEBERMAN, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought to recover \$750.00 claimed to have been illegally exacted from the plaintiff by the City and County of Denver, under the guise of a license fee demanded for the privilege of conducting its business therein. Defendant moved to strike out certain portions of the complaint, which motion was in part granted. An amended complaint was then filed, to which defendant interposed a demurrer on the ground that it did not state a cause of action. The demurrer was sustained and plaintiff elected to stand upon its complaint, and judgment of dismissal was entered. That judgment is now here for review.

The question involved is the right of the city to collect a license fee from defendant company for the privilege of conducting its business, which is that of an employment agent, engaged in furnishing technically trained persons to employers throughout the city, state and country. It is contended that the city has no such power, for the reason that the sum fixed was excessive as a police power license, and also because of the peculiar character of the business itself, which it is claimed removed it from the class of employment agencies furnishing common labor.

In view of the decision of this court in *Wilson v. City and County of Denver*, 65 Colo. 484, 178 Pac. 17, it is clear that employment agencies of the class here involved are not subject to police regulation as are those engaged in furnishing common labor. That case, however, does not determine that the city may not impose a license tax upon such employment agencies for the purpose of revenue. This is the only question in the case.

It is contended that the agency is licensed by the state and therefore the city is without power to compel payment of another tax. That the city may impose such tax, in spite of the payment of a state license, is definitely held in *Provident Loan Society v. City and County of Denver*, 64 Colo. 400, 172 Pac. 10.

The city bases its right to provide for the licensing of trades, callings and occupations upon section 137 of the Charter of 1904, which is as follows: "What callings shall be licensed, the license fee to be exacted in respect thereof in each case, and the conditions upon which the license shall be issued, shall, except as otherwise provided by the charter, be prescribed by general ordinance."

That the city may impose such an occupation tax as is provided for by the above section is clear from the decision in *Denver City Railway Co. v. Denver*, 21 Colo. 350, where this court, at page 356, 41 Pac. 826 (29 L. R. A. 608, 52 Am. St. 239) said: "Our conclusion is that the legislature, having in express terms conferred upon the city the power to tax, as well as to license and regulate, that the enactment of the ordinance under consideration was a legitimate exercise of that power, and the charge for license therein provided may be enforced as a valid tax."

In discussing the rule as to the right of a municipality to impose license taxes, it is said in 17 R. C. L. 536: "As it is elementary that every license tax is imposed for raising revenue, or as a police regulation, or for both purposes, it is a matter of indifference whether a license fee is exacted under the power to regulate or the power to tax, if the power to do either exists."

It is also contended that the business of the employment agency is interstate in character, and that a tax upon it is in effect an interference with interstate commerce. It is admitted, however, that some of the business done by it is intrastate and, moreover, that it has a state license. Without passing upon the effect of the business of furnishing employees to persons and corporations outside the state, which it is claimed is the main purpose of the agency

in question, it is apparent that such fact does not necessarily bring the business within the purview of the laws relating to interstate commerce, especially since that is not the exclusive business and purpose of the agency. In support of this proposition we quote the following from 17 R. C. L. 498: "A state statute imposing a general tax on certain kinds of business or occupations, and requiring a license to be taken out before such business or occupation shall be engaged in, must be construed as not applying to such business as may constitute interstate or foreign commerce, but only to such business of the kinds specified as constitutes local or state commerce, and to persons engaged or intending to engage therein. This is in accordance with the principle that when a statute is open to two possible interpretations, the court will adopt the one which will uphold the statute. Accordingly, if a corporation combines and carries on a local and state business, together with its interstate business, it is subject to state taxation and regulation so far as its local and state business is involved; and a statute is valid when applied to the local or state business of a corporation engaged in both state and interstate business or commerce, so long as it has a uniform operation throughout the state as to such business, and is not shown to be prohibitory or destructive thereof."

Applying this rule to the question before us, it appears that the city has the right at least to license the local business of the agency, regardless of the fact that the company does interstate business also.

Both upon principle and authority the license in question should be upheld as an exercise of the power to tax for the purpose of revenue. The judgment of the trial court is therefore affirmed.

Judgment Affirmed.

Mr. Chief Justice Garrigues and Mr. Justice Allen concur.

Decided April 5, A. D. 1920. Rehearing denied June 7, A. D. 1920.

No. 9615.

BOLLEN ET AL. *v.* WOODHAMS ET AL.

1. PLEADINGS—*Sham Plea*, is one which is good in form but false in fact.
2. —*Motion to Strike*, as sham, should be granted only on the most careful consideration.

The motion should precede a demurrer.

3. PRACTICE IN ERROR—*Presumptions*. Where a reply is held sham, upon evidence not presented in the record, the court of review must presume such evidence sufficient.

Error to Denver District Court, Hon. Henry J. Hersey, Judge.

Mr. GEORGE F. DUNKLEE and Mr. EDWARD V. DUNKLEE, for plaintiff in error.

Mr. JOHN T. BARNETT and Mr. JOHN CAMPBELL, for defendants in error.

Mr. Justice Denison delivered the opinion of the court.

THIS was a suit by Bollen, plaintiff below, against Woodhams and the Bonding Company on an injunction bond. The court sustained defendant's motion to strike the replication as a sham, and for judgment on the pleadings, and plaintiff brings error.

The third defense in the answer was a plea of *res adjudicata*. It alleged a previous judgment in plaintiff's favor, on the same bond, for damages caused by the same injunction, and satisfaction of such judgment. A demurrer to this plea was overruled.

If the replication was a sham it was properly stricken out, and then, if the answer was good (and it had already been held good on demurrer), there was nothing to do but render judgment for defendant, because, under such circumstances, no other judgment was possible.

The first question, then, is whether the replication was a sham. A sham pleading is one good in form but false

in fact. The replication to the third defense consisted of denials. If there was a record of such a judgment as was pleaded the replication was false. The court found it was false upon evidence that is not here by bill of exceptions and which we must therefore presume was sufficient.

A motion to strike a pleading as sham should be granted only with the most careful consideration because it supercedes the trial of the issue, but, if ever proper, such motion is so in a case where the trial is by record.

But plaintiffs insist that the said third defense was bad and their demurrer thereto should have been sustained. We think not. The plea states that the question of damages on the injunction bond was litigated and determined between these same parties on a cross-bill in the injunction suit. If that is true it bars this suit.

After demurrer overruled the plaintiff moved to strike out parts of the answer and the motion was denied. This was right. The motion to strike should have preceded the demurrer (31 Cyc. 633, 660), and was waived by pleading over. *Sweet v. Barnard*, 66 Colo. 526, 182 Pac. 22.

The motion here seems to be intended as a substitute for a demurrer, i. e., to test the sufficiency of the facts alleged. The function of the motion to strike is to clear away rubbish and so clarify the issues, not to test the sufficiency of a pleading.

Since what has been said requires an affirmance, we do not notice other points.

The judgment should be affirmed.

Garrigues, C. J. and Burke, J., concur.

Decided April 5, A. D. 1920. Rehearing denied June 7, A. D. 1920.

No. 9437.

DARIUS v. APOSTOLOS.

1. STATUTES—Construction. Where the legislative intent is doubtful resort to rules of construction is proper.

2. —*General Words, Following Specific*, are controlled by the former; but this rule is not allowed to defeat the plain legislative intent.
3. —*Ejusdem Generis*, has no application where the specific words signify subjects differing greatly from one another.
4. —*Statutes of Different Date*. The statutory regulation of barber shops by the act of 1909 (c. 138) is not to be received as controlling the interpretation of a statute enacted fourteen years previous thereto.

In construing the provisions of Rev. Stat. sec. 609, providing that all persons shall be entitled to the accommodations, etc., of "barber shops," the provisions of sec. 3 of chapter 55 of the laws of 1917 providing that no person shall be publicly proclaimed as excluded because of race, etc., are without importance.

5. **EQUAL EMPLOYMENT OF PUBLIC ACCOMMODATIONS**—*Statute Construed*. Boot-blackening stands are within the provisions of Rev. Stat. sec. 609.
6. —*Constitutional Law*. The statute is not unconstitutional.

Error to El Paso County Court, Hon. W. P. Kinney, Judge.
En Banc.

Mr. E. P. BLAKEMORE, for plaintiff in error.

Mr. G. W. MUSSER, Mr. W. D. LOMBARD and Mr. C. B. HORN, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

SECTION 1, chapter 61, Laws of 1895, page 139 (section 609, Revised Statutes, 1908), provides that "all persons" shall be entitled to the equal enjoyment "of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement," etc.

Section 2 of the same act, that any person violating the provisions of the foregoing "shall for every such offense forfeit and pay a sum of not less than fifty (50) dollars nor more than five hundred (500) dollars to the person

aggrieved thereby, to be recovered in any court of competent jurisdiction, * * * and shall also for every such offense be deemed guilty of a misdemeanor."

Plaintiff in error brought this action against defendant in error under the foregoing Act. The complaint alleges that the defendant conducted a bootblacking establishment in the City of Colorado Springs, service in which was refused plaintiff because he was a colored man. The prayer is for damages in the sum of \$500. A general demurrer to this complaint was sustained by the trial court, on the ground that defendant's business was not covered by the language of Section 1, *supra*. The cause is now before us on error and this is the sole question for our consideration.

Considering the penal character of this Statute the rule of strict construction must be applied. *Brown v. J. H. Bell Co.*, 146 Ia. 89, 123 N. W. 231, 124 N. W. 901, 27 L. R. A. (N. S.) 407, Ann. Cas. 1912B, 852.

Finding, as we do, that the judgment of the trial court must be reversed, each of the three principal contentions made by counsel for defendant will be discussed. They are as follows: 1st. That the doctrine of *ejusdem generis* is applicable and hence the phrase "all other places of public accommodation" should be read "all other *similar* places of public accommodation"; that defendant's place of business does not fall within the same general class as those enumerated; and that the identical question has been so decided in *Burks v. Basso*, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. 762.

We have heretofore stated the general application and limitation of this rule of construction as follows: "The familiar general rule, which is enforced in this jurisdiction, is that where words of general import follow specific designations the application of the general language is controlled by the specific. This is but a rule of construction, and is not allowed to defeat the plain legislative will; yet where the legislative intent is doubtful, resort to rules of construction is proper." *Gibson v. People*, 44 Colo. 600-605, 99 Pac. 333.

The decision in the New York case was as asserted by defendant, but we are of the opinion that it is based upon false reasoning. That court says, page 344: "A bootblacking stand may be said to be a place of public accommodation, like the store of a dry goods merchant, a grocer, or the proverbial 'butcher, baker and candle stick maker.'" This, we think, is incorrect. The principal business of such establishments is the sale of merchandise, whereas the principal business of barber shops and bootblacking stands is the furnishing of personal service. They do not, therefore, belong in the same general class. Furthermore, while the New York court points out that "bath houses and barbershops are not in the same class with hotels and public conveyances," the bearing of this distinction on the question at issue, and the rule of law therefore necessarily applicable, seems to have been overlooked by it. This determination of the diversity of character in the kinds of business specifically enumerated, removes the case from the application of the doctrine of *ejusdem generis*.

Where the kinds of business enumerated bear no common analogy to each other except that they are all for pecuniary profit the rule is not applicable. *Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481.

The rule does not apply where the specific words signify subjects greatly different from one another. *McReynolds v. People*, 230 Ill. 623, 82 N. E. 945-948. A bootblacking stand is a "place of public accommodation." It is of the same general class as "barber shops", in that the business of each consists principally in furnishing personal service and the two are quite generally operated in conjunction, but it is not of the same general class as "public conveyances on land or water", or "theaters", hence, in the instant case, the doctrine of *ejusdem generis* is not applicable.

2nd. That such a distinction exists between barber shops and bootblacking stands as to clearly imply the exclusion of the latter from the operation of the Act of 1895; which distinction, it is said, arises from the fact that barber shops are impressed with a public character by reason of their statutory regulation (Laws of 1909, page 294).

In view of the fact that such statutes were not enacted until fourteen years after the section in question here, the contention is without merit.

3rd. That defendant's business must be excluded from the phrase "all other places of public accommodation" because it is omitted from the definition of that phrase as contained in sec. 3, chap. 55, Laws of 1917, p. 163.

There is no such relation between the two Acts as would give to the definition even the doubtful force of later legislative interpretation. The former prohibits certain *discrimination*. The latter prohibits only the *advertisement* of certain discrimination. The former provides that "all persons" shall be entitled to the privileges of the establishments mentioned. The latter that no person shall be publicly proclaimed as excluded because of "race, sect, creed, denomination or nationality". Moreover the definition of the phrase in the Act of 1917 is by its express terms limited to that Act. The later Act neither repeals, amends nor refers to the former; and there is nothing to suggest that the legislature had the one in mind when the other was passed. The same process of reasoning which would exclude bootblacking stands from the definition "all other places of public accommodation", as used in the Act of 1895 would also exclude bath houses; but if the definition of "places of public accommodation" found in the Act of 1917 is to be applied to the phrase as used in the Act of 1895, then "bath houses", which are specifically mentioned in the later Act, must be read into the former. Hence this contention is without merit.

Moreover, the legal presumption is that words and phrases in a statute are used in their usual sense unless the intent clearly appears to use them in a more restricted or different sense. *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599-605, 121 C. C. A. 627. No such intent can here be made to appear, except by the application of that rule of construction which we have above eliminated. The phrase here in question "all other places of public accommodation", given its commonly accepted meaning, includes

bootblacking stands. To hold otherwise would be to construe that phrase out of the Statute, it being impossible to interpret it as meaning "all other *similar* places of public accommodation" for the reason that "barber shops" and "public conveyances on land and water" are so dissimilar that no place of public accommodation can be similar to both.

The judgment is accordingly reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Bailey, Teller, and Scott, JJ., dissent.

Mr. Justice Teller dissenting: The majority opinion declines to follow *Burks v. Bosso*, 180 N. Y. 341, because of an alleged defect in the reasoning, in that the court applied the rule of *ejusdem generis* to an enumeration of places of business of diverse character. That rule of construction is said to be eliminated, but it seems to me that it is the basis of the conclusion announced. It is pointed out that barber shops and bootblacking stands have a common feature, in that both are devoted to the rendering of personal service. Hence it is concluded that the specifying of barber shops justified the court in construing bootblacking stands as coming within the meaning of the general words "places of public accommodation."

I submit that this is an application of the supposedly eliminated rule of *ejusdem generis*. But, the rule is in fact applicable, and was properly applied in the New York case.

Classification of places of business does not depend upon their being similar in all respects. A single characteristic in each one may be sufficient to put them in one class. This is recognized in the opinion, the characteristic being the rendering of personal services. In this case, the places of business mentioned are, in their nature or by long usage, subject to regulation and supervision in the interest of the public health, safety, or general welfare. This common characteristic, i. e., subjection to public control, makes them all of one class. As this is the only classification of which

the places of business are, apparently, capable, it follows that the general words should be held to apply only to places of that class. This is strictly in accord with sound reason.

No reason is advanced to show that the public has any concern in the management of a business which, in no way, affects the public health, safety or morals. Why should a bootblacking stand, any more than a news stand, be subject to this regulation?

The rule that a penal act is to be strictly construed is admitted, but not applied. The defendant's place of business is brought within the statute, and his act made a misdemeanor, when the intent of the legislature to include such business is by no means clear.

Although the members of the New York court of appeals, after careful consideration, were of the opinion that their statute, practically identical with ours, did not include bootblacking stands, this defendant is presumed to know that our statute includes his business, and he is to pay the plaintiff not less than \$50 and possibly \$500, and be subject also, to a possible term in the penitentiary. Why? Because he did not draw the proper inference from general words following special terms. Otherwise stated, a penitentiary offense is imputed to him by implication, a thing which has many times been denounced. "Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms. * * * It is a principle in the construction of statutes that the legislature does not intend the infliction of punishment, or to interfere with the liberty or rights of the citizen, * * * by doubtful language; but will in such cases express itself clearly, and intends no more than it so expresses." Sutherland on Statutory Construction, sec. 350. The text is supported by numerous authorities.

This is a case eminently fitted for the application of the rule, said to be coeval with municipal law, that "Purely statutory offenses shall not be established by implication, and that acts otherwise innocent and lawful, do not become crimes, unless there is a clear and positive expression of

the legislative intent to make them criminal." *People v. Phylfe*, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141.

In *Rex v. Bond*, 1 B. and Ald. 390, it is said: "It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the act of parliament do not authorize it." The rule is also that "if the words are equally capable of a construction that would, and one that would not, inflict a penalty", the latter construction should be adopted. *Sutherland on Statutory Construction*, sec. 352.

Here by a process of reasoning, the defendant in error is held to have committed an offense. No intent to include bootblacking stands is expressed in the law, nor is it even fairly implied. The decision violates rules of law which have been developed through centuries for the protection of the rights and liberty of the people. The judgment of the trial court was right and ought to be affirmed.

I am authorized to state that Mr. Justice Scott concurs in the views above expressed.

On Rehearing.

Burke, J. It is now strenuously contended that sec. 609, R. S. 1908, as we have herein construed it, is unconstitutional. If such construction makes the act unconstitutional as applied to the business of defendant in error, it is, for the same reason, unconstitutional as to barber shops. The contrary has been held, and we think correctly. *Messenger v. State*, 25 Neb. 674, 41 N. W. 638. The subject is one for the exercise of legislative, not judicial, discretion. The former opinion is adhered to.

Scott, Teller and Bailey, JJ., dissent.

Decided December 1, A. D. 1919. Rehearing denied June 7, A. D. 1920.

No. 9258.

CLAUSSEN v. FIRST NATIONAL BANK OF MONTE VISTA.

ESCROW—Conditions construed. Certain promissory notes and other papers were deposited with defendant, with written instructions to the effect that if parties named should demand the paper by a day designated, the bank should surrender them. No such demand was made. The bank was justified in delivering the notes to the payees named therein.

*Error to Rio Grande District Court, Hon. A. Watson
McHendrie, Judge.*

Mr. JOHN I. PALMER, Mr. JOHN HELBIG, and Mr. JESSE STEPHENSON, for plaintiff in error.

Messrs. BARDWELL, HECOX, MCCOMB and STRONG, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff in error, plaintiff below, on the 19th day of September, 1912, entered into a written agreement with Rutherford L. Dowdell and Charles C. Baum, doing business as the Monte Vista Realty Company, whereby the latter agreed to sell, and the plaintiff agreed to purchase, a certain tract of land in Rio Grande County for the agreed consideration of \$35,575.76, payments to be made as follows: \$500 cash, thirteen notes of \$1,000 each, and one note for \$1,375.76, all due and payable before the first day of March, 1913, and to assume and agree to pay a mortgage of \$20,000 then covering the land.

It was agreed that a check for \$500 and the several promissory notes should be deposited with the defendant, the First National Bank of Monte Vista, in escrow until September 26th, 1912, upon the following condition: "That if the party of the second part, his sons, namely Fred Claussen and Jake Claussen, shall on or before that time after inspecting the land, not be satisfied as to the value and quality of the land above described, then this contract shall become null and void and of no effect. And the party

of the second part shall have until the 26th day of September, 1912, for the said Fred and Jake Claussen to make such inspection, otherwise this memorandum of agreement is for specific performance and shall extend to and be binding and obligatory upon the parties hereto, their heirs, executors and assigns."

A copy of this agreement was deposited with the bank with the following instruction in regard to the transaction, in writing signed by the parties:

"Monte Vista, Colo., Sept. 19, '12.

The First National Bank,

City.

Gentlemen: We hand you herewith contract between the Monte Vista Realty Company and Peter Claussen, also check for \$500.00, and thirteen notes for \$1,000.00 each, and one note for \$1,375.76. You are to keep these papers in your possession until the 26th day of September, 1912, and in the event that the said Fred Claussen and Jake Claussen make demand for the notes and check herewith enclosed, you are hereby authorized to do so, according to the terms and agreements of the contract herewith enclosed.

THE MONTE VISTA REALTY COMPANY,

By Rutherford L. Dowdell.

PETER CLAUSSEN."

There was no demand for the return of the notes and check by Claussen or either of his sons on or before the 26th day of September, nor at all, and the defendant bank delivered to the Monte Vista Realty Company the check and promissory notes as stipulated in the agreement.

It appears that the two sons of Claussen did inspect the land on or about the 26th day of September, and were dissatisfied with the same and so notified the Realty Company, but did not advise or notify the bank of this fact, nor at any time claim possession of the contract or papers.

The Realty Company cashed the check and disposed of a portion of the notes to innocent third persons. The check was paid by Claussen's bank, and he afterward paid some of the notes so disposed of as late as October, 1913, or more than one year after the delivery of the same to the bank.

He also moved upon and took possession of the land, but the contract was not consummated, and later Claussen brought suit against the Realty Company to rescind the contract of purchase and sale, and secured judgment for the cancellation of the notes remaining unpaid and in the possession of the Realty Company.

This suit is by Claussen to recover damages from the bank for alleged wrongful delivery of the check and notes to the Realty Company.

A demurrer to the complaint was overruled and the defendant bank answered, setting up its demurrer to the complaint, denying the violation of the escrow agreement, and alleging a ratification of its acts by reason of the acts and conduct of the plaintiff, before stated.

The cause was tried to the court and judgment rendered in favor of the defendant bank. In rendering judgment, the court said: "The reasons for the findings are that regardless of whether or not the papers in escrow have been delivered by defendant in violation of the terms of the escrow, and not finding one way or the other as to that, for the court is persuaded that for the purposes of this decision we may assume that the papers were wrongfully delivered, and still the complainant cannot recover for the reason that, first, plaintiff by his action to rescind the contract, which was the basis of the escrow papers, elected to stand by the contract, and secondly, the plaintiff is estopped from recovery by his subsequent ratification of the action of the defendant in delivering the papers."

Regardless of the question of ratification, we think the court should have found that the bank as an escrow holder was absolved from liability under the undisputed facts in the case.

The condition of the escrow was that unless the plaintiff's sons should make demand for the notes and check on or before the 26th day of September, 1912, they were to be delivered to the Realty Company.

It is admitted that there was no such demand and the bank was therefore obligated to make such delivery. The complaint did not allege facts which constituted a violation of the condition upon which the notes and check were to be delivered, and the demurrer should have been sustained in the first instance.

The judgment is affirmed.

Garrigues, C. J. and Denison, J., concur.

No. 9434.

ABDUN-NUR v. VALDEZ.

1. PLEADING—*Want of consideration.* Where defendant, in an action upon contract, would plead want of consideration he must set up the facts from which this conclusion is to be drawn, so as to advise the plaintiff what he will be called upon to meet by way of evidence. *Welles v. Colorado Company* 49 Colo. 508 followed.
2. —*Plea construed.* Action by physician upon a promissory note bearing the signature of defendant. Plea that "if ever signed by defendant it was when defendant was in such feeble mental condition that he was unaware of what he was doing, and such note was based on no consideration."
- Held* that plaintiff was not thereby advised that defendant would prove an agreement that a sum paid by defendant should cover all treatments past and future, nor that plaintiff's services were given gratuitously, nor that defendant would deny the consideration; that the plea offered no issue.
3. PRACTICE IN ERROR—*Submitting to the jury a question upon which there is no evidence,* is error.

*Error to Huerfano District Court, Hon. A. Watson
McHendrie, Judge.*

Mr. PHILIP HORNBEIN, for plaintiff in error.

Mr. JOHN A. RUSH, Mr. FOSTER CLINE and Mr. JOHN L. EAST, for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error brought suit against one Valdez, the testator of the defendants in error, to recover upon a promissory note alleged to have been executed and given for medical service rendered to the said Valdez.

The answer denied the making and delivery of the note and then alleged that: “* * * if any such note was ever signed by the defendant herein, that it was signed at a time when defendant was mentally and physically sick, and at a time when said defendant was in such a feeble mental condition that he was wholly unaware of what he was doing or of the nature of his act; that such signature was wholly involuntary, and that such note was based upon no consideration whatever and is void and of no force and effect.” The other matters of the answer are not material to the case, as we view it.

Upon the trial plaintiff testified to the making and delivery of the note and to the rendering of medical services to the defendant for a period covering some weeks, including several surgical operations.

The defendant testified that prior to the date of the note he gave the plaintiff the sum of \$500.00, which was, by agreement, in full for all services theretofore rendered and to be rendered to him. He also testified that he was unable to say what happened to him for several days prior to and after the date of the note. He denied that he signed the note.

Other witnesses for the defense testified that the defendant was sick and under the care of the plaintiff on January 29th and 30th, January 30th being the date of the note, but none of them testified that he was mentally incapacitated at that time.

The court gave to the jury the following instruction: “You are instructed that if you find from the evidence that the note in question, and sued upon herein, was without

consideration, your verdict shall be for the defendant." To this the plaintiff objected on the ground that the answer did not properly plead a want of consideration; that there was, therefore, no such issue in the case.

Plaintiff in error contends that this instruction is bad for the reason stated in his objection to it on the trial, and relies upon *Welles v. Colorado Co.*, 49 Colo. 508, 113 Pac. 524, to support his contention.

In the case cited it was held that a plea of no consideration falls within section 56 of the Code which provides that the answer shall contain "a statement of any new matter constituting a defense, * * * in ordinary and concise language."

It was there said that under the Code the facts surrounding the making of the contract, or note, from which the conclusion of no consideration resulted, must be set up, so as to advise the adverse party what he would be called upon to meet by way of evidence. A note might be given, under widely varying circumstances, in each of which cases it would appear that there was no consideration for the obligation. To allege only that there was no consideration gives no information as to the facts relied upon to show it.

If it were true that a finding of no consideration would result from nothing but the fact that nothing passed between the parties, a plea of no consideration would be good, since there would be nothing but that fact to establish. The instant case shows the necessity of pleading the facts from which want of consideration results. On the trial the defendant sought to prove that there was no consideration by showing that there was an agreement that the \$500.00 paid should cover all the treatments received; and to be received; and, again, by showing that the treatments were given gratuitously. The plaintiff was not, under the plea, advised that the defendant expected to prove either of said matters to defeat the consideration which the note imports.

Defendant in error, however, contends that the plea in fact sets out the grounds of that defense. The allegations which are thus relied upon, do not sustain the contention. All that precedes the allegation that the note was based upon no consideration, belongs to the defense that the defendant never executed the note; that is, that there was no *valid* execution of it. Whether or not it was upon a consideration, is an entirely different matter. The plea was bad, and made no issue upon which the jury could be instructed.

The court also submitted to the jury the question whether or not the defendant's signature to the note was wholly involuntary. To this objection is made that there was no evidence justifying the instruction. We think this objection also is well taken. There is nothing in the evidence given to prove that the defendant was incapable, on the date of the note, of making a valid contract. His own witnesses testified to the contrary.

Instruction No. 7 concerns the same subject and left it to the jury to determine whether or not plaintiff secured the note from the defendant when the latter was in such a feeble mental condition that he was unaware of what he was doing. There was no evidence to justify that instruction and the giving of it was error.

The judgment is accordingly reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9491.

MACK v. TOWN OF CRAIG.

1. MUNICIPAL CORPORATIONS—*Powers*. A town has no authority to condemn for sewer purposes private land situate without its limits.

Nor to pollute a public stream with sewage.

2. EMINENT DOMAIN—*What May Be Taken*. Neither public waters nor the bed or channels of public streams.

Error to Moffat District Court, Hon. John T. Shumate, Judge.

Mr. A. M. GOODING and Mr. GEORGE A. PUGHE, for plaintiff in error.

Mr. W. B. WILEY, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFF in error brings the cause here to review a judgment of the District Court of Moffat County whereby certain of his land was awarded the town of Craig in condemnation proceedings, as an outlet for its sewage into the Yampa or Bear river. It was and is the purpose of the town to empty its raw and unpurified sewage into that stream, at a point bounded on both sides by lands of the plaintiff, and to carry it for a distance of about a mile through his property, which he uses mainly for dairy business. Numerous errors have been assigned, but for the purposes of this decision it will be necessary to consider only such as go, first, to the question of the authority of the town to condemn and take land beyond its corporate limits, and, second, as to its right to pollute a public stream by emptying raw sewage therein.

The town relies upon section 6525, R. S. 1908, in which, the right is given to towns and incorporated cities to keep in repair sewers, culverts, drains and the like, and also power of eminent domain. There appears to be nothing, however, either in that section or in section 5359, R. S. 1908, which empowers cities and towns to assess the costs of such improvements to its inhabitants, or in section 5361, which specifies what class of improvements can be made, that either directly or by fair intendment authorizes such municipalities to exercise the power of eminent domain beyond their corporate limits. It is well settled that the power to construct such improvements does not carry with it the right to condemn private property to that end.

In Lewis on Eminent Domain, section 371 (3rd Ed.), it is said: "The authority to condemn must be expressly

given or necessarily implied. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. 'There must be no effort to prove the existence of such high corporate right, else it is in doubt; and, if so, the State has not granted it.' If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be acquired by contract. * * * As a rule, a municipal corporation cannot condemn property beyond its limits, unless authority to do so is expressly given."

Upon the proposition that a municipality has no power to condemn property outside its corporate limits, unless authority so to do is specifically given, as stated above, 28 Cyc., at page 605, has this to say: "As a rule a municipal corporation has no power to purchase and hold land for a park, highway, or other municipal purpose beyond its territorial limits, unless the power has been specially conferred upon it by the legislature; and such power is not conferred by a general grant of power to purchase, hold, and convey such property, real and personal, as may be necessary for its public uses and purposes. The legislature, however, may confer such power, either in express terms or by necessary implication; and there are cases in which, without any special grant of such power, it has been implied as necessary in order to carry out powers granted."

So far as we are able to ascertain this general rule has been followed and approved with practical unanimity. In *Warner v. Gunnison*, 2 Colo. App., that court expressed its view of the rule at page 432, 31 Pac. 238, in the following language: "The jurisdiction of municipal authorities is usually limited to the territory occupied by the corporation. For this reason proceedings in condemnation cannot ordinarily be instituted as to property outside the corporate limits."

Also in *Healy v. City of Delta*, 59 Colo. 124, 147 Pac. 662, in discussing the right of a municipality to condemn the bed of a public stream for sewer purposes, it is said, at page 125: "It is assigned as error that the court was without jurisdiction to enter the judgment which in effect condemns the waters of the river, and makes it a part of the sewer system. This is the only question necessary to be considered. Municipal corporations can exercise the right of eminent domain only to the extent to which the power has been conferred upon them by statute. 'Not only must the authority to municipal corporations, or other legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified, but the power, with all constitutional and statutory limitations and directions for its exercise, must be strictly pursued.' Dillon Mun. Corps., 5th Ed., sec. 1040. See also, Lewis on Eminent Domain, sec. 240. *Allen v. Jones*, 47 Ind. 438."

Thus from our own decisions it appears clear that, unless expressly empowered by statute, the town of Craig has no authority to condemn land outside its corporate limits for sewer purposes. The bare right of the town to construct and maintain sewers can not be held to include the right to condemn property beyond its corporate limits in connection therewith. 15 Cyc. 569; *Riley v. Rochester*, 9 N. Y. 64; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; *Wise v. Yazoo City*, 96 Miss. 507, 51 South. 453, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912B, 377; *Currier v. Railroad Co.*, 11 Ohio St. 228; Lewis on Eminent Domain, § 240; *Minnesota C. & P. Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182.

It is not disputed that the statute confers no direct or specific power upon municipalities to go beyond their corporate limits to condemn property for sewer purposes, but it is earnestly contended, however, that such power is given by necessary implication. A careful reading of the sections relied upon discloses no evidence of any such legislative intent. Since, under the authorities it is evident that the giving of the right to construct sewers does not also

grant authority to subject outside lands to the operation of eminent domain, such power is not implied because there is nothing in our statutes to even indicate, much less imply, such purpose. In reaching the conclusion that authority to condemn outside lands for sewer purposes does not exist in towns and incorporated cities, and that it was not the legislative intent to confer such power, we find strong support in the fact that the statutes do expressly confer power upon such entities to condemn land outside their corporate limits for the purpose of securing a water supply, section 6815, R. S. 1908. And also from the fact that by the provisions of the charter of the City and County of Denver the legislature has expressly conferred power upon that particular municipality to condemn lands outside its limits in connection with the construction of sewers. By specifically thus granting extra-territorial powers of condemnation the legislature must be conclusively presumed to have elsewhere intentionally withheld such power, and the argument that it exists by implication is, under such circumstances, not tenable, as there is no warrant of law for such conclusion.

In consideration of the question as to whether municipalities have a right to pollute state public streams it is to be noted that section 1817, R. S. 1908, expressly makes the pollution of such public waters by discharging sewage or any other obnoxious substance therein a criminal offense. There is nothing inherent in a municipality which gives it any greater right so to do than that which a natural person has.

Section 65 of Lewis on Eminent Domain declares that: "No case appears to have arisen in which the pollution of a stream has been accomplished for a public purpose and in the exercise of the eminent domain power." In *Mining Co. v. Mining Co.*, 9 Colo. App. 407 (48 Pac. 828), it was said, at page 418: "We live in a region not blessed with rains and where all our industries, whether agricultural, manufacturing or mining, are dependent absolutely on the waters of our streams, as to those purposes for which water is a necessity. It is therefore quite consonant with the ap-

parent purpose, and declared will of the people, to subject the rights of the appropriators of the public waters of the state to such limitations as shall tend not only to conserve the property interests which the appropriators may acquire, but to preserve the remaining unappropriated waters in their original condition for the use and benefit of late comers, who by their labors and industry may further develop our interests and resources."

And in *Humphreys Co. v. Frank*, 46 Colo. 524 (105 Pac. 1093), this court, at page 531, said: "The fact that defendant in operating the mill uses waters which are not a part of the natural flow of a stream does not give it the absolute right to discharge into that stream the waste water mixed with hurtful slimes, or absolve it from liability for resulting injuries to third persons who have lawfully acquired prior rights to use the waters thereof for any beneficial purpose."

In *Winchell v. City of Waukesha*, 85 N. W. 668, 84 Am. St. Rep. 902, 110 Wis. 101, which was an injunction suit to restrain the City of Waukesha from emptying its sewage into the Fox river, the court says: "The right of the riparian owner to the natural flow of water substantially unimpaired in volume and purity is one of great value, and which the law has nowhere more persistently recognized and jealously protected than in Wisconsin. Not alone the strictly private right, but important public interests, would be seriously jeopardized by promiscuous pollution of our streams and lakes. Considerations of aesthetic attractiveness, industrial utility, and public health and comfort are involved. Amid this conflict of important rights, we cannot believe that the legislature concealed, in words merely authorizing municipalities to raise and expend money for the construction of sewers, a declaration of policy that each municipality might, in its discretion, without liability to individuals, take practical possession of the nearest stream as a vehicle for the transportation of its sewage in crude and deleterious condition."

That court in the above case also announced the rule that legislative authority to merely construct a sewer carried

with it no implication of a right to create a nuisance by the discharge of raw sewage into a stream, and that a city had no greater right in this respect than the individual.

Plainly the town of Craig by its acts is not only injuring a valuable property right of defendant, but is guilty of an invasion of the sovereign rights of the state, and is, under pretense of necessity, doing that which, if done by an individual, he would be punished criminally. Cities and towns, in the absence of direct legislative permission to that end, have no right to befoul and contaminate our public streams by discharging raw and unpurified sewage therein. Indeed, it is highly questionable, whether, in view of Article XVI of section 5 of our Constitution, any such legislative permission could be lawfully given.

It is the law of this jurisdiction that neither the public waters, nor the beds or channels of public streams, can be condemned and taken under eminent domain. *Healy v. Delta, supra*. It is contended that no such attempt is here being made. However, it is to be noted that the authorities hold that a pollution of a public stream is in effect such taking. 15 Cyc. 660, and Lewis on Eminent Domain, section 84. It is manifest that no one should be permitted thus to indirectly accomplish that which can not be legally done by virtue of eminent domain proceedings. The situation is one pre-eminently for legislative consideration.

The judgment of the trial court is reversed, and the cause remanded, with directions to dismiss it.

Decision *en Banc*.

Mr. Chief Justice Garrigues dissents.

No. 9478.

SCHOLTZ v. HAZARD.

1. JUDGMENT—*Presumptions*. An order of the County Court reciting that a claim presented against an intestate estate was "a certified copy of a judgment heretofore entered against said deceased", must be taken as true, and shows compliance with the statute.

2. **APPEAL**—*County to District Court.* An appeal lies to the District Court from an order of the County Court setting aside the previous allowance of a claim against a decedent's estate.
3. **NOTICE**—*Evidence.* The papers and files of a cause determined in the District Court on appeal were returned to the County Court five days before the estate was declared insolvent and closed. Held that one with whom the executors and heirs had stipulated for such declaration of insolvency, etc., was in no position to allege ignorance of the judgment of the District Court.
4. **LIMITATIONS**—*Judgment.* Plaintiff obtained judgment in 1894 against one afterwards deceased. The allowance thereof against the estate in 1911 was a new judgment, to which the twenty-year limitation (Rev. Stat., sec. 7211) was no plea.

A claim filed against a decedent's estate within eight months after the granting of letters of administration, is within the time limited by the statute of non-claim.
5. **EQUITY**—*Laches.* A delay of six months in the institution of an action to unravel the fraudulent closing of a decedent's estate, was held, under the circumstances of the case, not laches.
6. **ADMINISTRATOR**—*Duty and Liabilities.* An administrator is trustee for all the creditors of the estate and it is his duty if possible, to redeem the estate from hostile holdings or sell it for an amount which will pay every creditor, in whole or in part.

An administrator who, for his own gain, assumes a position in hostility to a creditor, and arranges that his own claims as heir at law shall take precedence of the claim of the creditor commits a fraud.
7. **PARTY TO FRAUD**—*To Liability.* One who enters into a contract with an administrator by which the administrator is disabled from performing his duty to a creditor of the estate will not be heard to say what the administrator might have or might not have done, but for his unlawful conduct.
8. **PRACTICE IN ERROR**—*Judgment.* Defendant had entered into a fraudulent scheme with the administrator of an intestate estate, the effect of which was to exclude the claim of the plaintiff against said estate. Valuable premises pertaining to the estate had been sold to satisfy a mortgage, and defendant purchased the certificate of purchase. Judgment for defendant was reversed with directions to the court below to enter judgment for the plaintiff, declaring his judgment to be a lien on the premises in question as of the date of the sheriff's deed, but subject to the amount of the certificate of purchase, without interest.

Error to the Denver District Court, Hon. J. L. Cooper, Judge.

Mr. T. J. O'DONNELL, Mr. CANTON O'DONNELL, Mr. G. W. MUSSER, for plaintiff in error.

Messrs. BENEDICT & PHELPS, for defendant in error.

Department One.

Mr. Justice Burke delivered the opinion of the court.

ELIZA (SKELTON) SWIFT was the administratrix of the estate of her mother, Catherine W. Skelton, deceased, against which estate plaintiff in error held a claim of \$901.46, based upon a judgment against deceased. The property of the estate consisted of lands and water rights. These had been sold at sheriff's sale, under a mortgage foreclosure, to satisfy a debt of approximately \$34,000. Boyington Skelton was the brother and confidential adviser of the administratrix. Other heirs employed a real estate broker to find a purchaser for the property, in order that the debts might thereby be paid, and something saved for the heirs. This broker obtained an option on the sheriff's certificate of purchase, and in the further discharge of his duties under that employment opened negotiations with defendant in error, who was on intimate terms with Boyington Skelton, and was a creditor of the administratrix to the extent of some \$2,500, secured by a mortgage on her home. Defendant was fully cognizant of the relation existing between the administratrix and Boyington Skelton. A sheriff's deed was due under the certificate of sale on August 25, 1914. August 7, 1914, defendant in error entered into a contract with Boyington Skelton by which he agreed to pay Skelton \$4,000, in consideration whereof Skelton agreed *inter alia*, to convey to defendant the property in question, and procure a similar conveyance thereto from the administratrix; to assign a claim which he held against the estate; to protect defendant against the redemption of the property by his own creditors or those of the estate; to assist de-

defendant in obtaining possession of the premises after the execution of the sheriff's deed; and immediately thereafter to have the estate declared insolvent and the administratrix discharged. All these things being conditions precedent to the payment of the said sum of \$4,000. On the said 25th day of August sheriff's deed was issued to defendant and the conditions to be performed by Skelton under the terms of this contract were carried out. On March 8, 1915, the estate was declared insolvent on the petition of the administratrix and she was discharged. Plaintiff's claim was not paid. A week later defendant paid Skelton the \$4,000 mentioned in the contract, crediting the administratrix with \$800 on her note as a part of that payment. September 25, 1915, plaintiff in error filed his complaint in the district court setting up these and other facts, alleging that defendant, having made certain secret settlements, induced the administratrix and other heirs to refrain from redeeming from the sheriff's sale, in order that he might obtain the property at less than its actual value and defeat the judgment, and praying that his claim be decreed a lien upon the property. The answer denied defendant's knowledge of plaintiff's judgment; denied any arrangement with the administratrix for a quit claim of her interest in the estate; denied that the property was worth the amount of plaintiff's claim in excess of the sum brought at the execution sale; denied that he induced the administratrix or any of the other heirs to refrain from redeeming the said property, or paid them any consideration for so doing, or that he obtained the property for less than its real value; denied the making of secret settlements; and pleaded affirmatively the 20-year statute of limitations, Sec. 3609, R. S., 1908, as well as the bar of paragraph 4, Sec. 7206, R. S. 1908, which provides for the filing of claims against estates within one year from the granting of letters. The new matter in the answer was denied by replication. An amendment to the answer was filed alleging that the allowance of defendant's claim by the county court had been set aside by that court on April 29, 1914. A replication to the amendment denied

the jurisdiction of the County Court to make said order, an appeal therefrom to the District Court, and the reversal therein of said order of April 29. Trial was had in the District Court and on September 28, 1917, judgment was entered therein against the plaintiff, and such further proceedings thereafter had that the cause is now regularly before us for review on error.

Burke, J., after stating the case as above.

The parties plaintiff and defendant here were plaintiff and defendant in the court below and will be hereinafter so designated.

If, as defendant contends, plaintiff has no standing here, this writ should be dismissed and the judgment affirmed, irrespective of the facts set up in the complaint. Hence we will first consider the principal reasons urged why such action should be taken. They are: That the complaint sets up no equities in plaintiff: That the exhibition of plaintiff's claim in the County Court was not accompanied by "an exemplification of a record whereon such claim was founded" as provided by statute: That the order of the court setting aside its former order allowing the claim was not a final judgment, hence not appealable: That the judgment of the District Court re-instating the claim was not brought to the attention of the County Court: The bar of the twenty-year statute of limitations requiring the issuance of execution on a judgment within twenty years from the entry thereof: The bar of the non-claims statute requiring the filing of such a claim within one year from the granting of letters of administration: And laches.

1. The plea of the contract between Boyington Skelton and defendant, the relation of the administratrix thereto, and the fulfillment of the terms thereof, was, for the reasons hereinafter set forth, a sufficient allegation of equities in the plaintiff.

2. The order of the County Court dated April 15, 1911, allowing the Scholtz claim recites that said claim was "a certified copy of a judgment heretofore entered against said deceased." That finding must be taken as true and

shows a sufficient compliance with the statute concerning the method of exhibiting such claim.

3. The order of the County Court, by which its judgment allowing plaintiff's claim was set aside and held for naught, was a final judgment as to that claim, and so far as the County Court was concerned plaintiff had no further recourse. It was hence appealable. *Balfe v. Rumsey et al*, 55 Colo. 97, 104, 133 Pac. 417, Ann. Cas. 1914C, 692.

4. The hearing in the District Court was on written stipulation. The papers and files were returned to the County Court five days before the estate was declared insolvent and closed under the Hazard contract, hence defendant is in no position to claim lack of notice of that judgment.

5. Plaintiff's original judgment was obtained in 1894, and his claim based thereon was allowed in 1911. It thereupon became a new judgment against the estate and the plea of the 20-year statute is not good. R. S. 1908, Sec. 7211.

6. Plaintiff's claim was filed against the estate eight months after the granting of letters of administration, hence within the time limited by the non-claims statute.

7. This is an action against defendant, not against the Skelton heirs. The question here is not when the cause of action arose as against the deceased, but when it arose as against defendant. That date was approximately six months prior to the filing of the complaint. Under the circumstances of this case such a delay does not constitute laches.

There remains to be considered the principal contention of plaintiff: That the administratrix, at the instigation of defendant, put herself in a position so inconsistent as to be intolerable in equity, and that defendant can retain no advantage he may have secured thereby.

An administrator is a trustee of whom the utmost good faith is required. *James et al v. Kelley et al*, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135. He is particularly the representative of the creditors, holding the estate as a trust fund for the payment of debts. 11 R. C. L., p. 25. The law esteems it a fraud in such a trustee to take, for his own

benefit, a position in which his interest will conflict with his duty. *Sheldon v. Estate of Rice*, 30 Mich. 296, 301, 18 Am. Rep. 136. The administratrix was a trustee for the plaintiff. As such it was her duty, if possible, to redeem the property from the claim of defendant, or sell it for such an amount over and above that claim as would pay the judgment of plaintiff, or some portion thereof, although as an heir she obtained nothing thereby. By the terms of the contract between Boyington Skelton and defendant, with which terms the administratrix scrupulously complied and which contract must therefore be held to be her contract, she took a position for her own benefit (in the sum of \$800) which conflicted with her duty to see that plaintiff's claim as a creditor took precedence of her own claim as an heir. This conduct on the part of administratrix the law esteems as a fraud. Defendant, who was a party to that contract, can take no advantage under it against one who might have been injured thereby. Whether the dministratrix could in fact have made any arrangements by which redemption from the Hazard judgment would have been possible is immaterial. Defendant having tied her hands will not now be heard to say what she could or could not have done but for his conduct.

The judgment is accordingly reversed with directions to the trial court to enter judgment herein for plaintiff decreeing his claim to be a lien on the premises in question as of the date of the sheriff's deed, subject to the amount of the certificate of purchase. No interest will be figured on the certificate of purchase subsequent to the date of the deed; the presumption being that that amount is offset by defendant's possession of the premises, which presumption defendant, by reason of his own wrongful acts, cannot be heard to deny.

Garrigues, C. J., and Teller, J., concur.

No. 9497.

MAYHEW v. GLAZIER ET AL.

1. PLEADING—*Waiver*. Answer and proceeding to trial after the overruling of a demurrer waives the error in that ruling, except as to the ground that no cause of action is stated.
 2. —*Construed*. The complaint alleged that defendant agreed to “immediately forward” to the home office of an insurance company, plaintiff’s application for insurance of a certain crop against injury by hail; default made and subsequent injury to the crop by hail. *Held* that defendant was the agent of plaintiff to forward the application, that in this application he acted for himself and not for the insurance company, and that a cause of action was shown.
 3. —*Amendment—Upon trial, not prejudicial*, is not error.
 4. CONTRACT—*Public policy*. Contract of the agent of an insurance company to forward to the home office an application for insurance is not in conflict with any duty of the agent to his principal, and is not against public policy.
- The agent accepted the promissory note of the insured, payable to himself, for the premium; inasmuch as this was permitted by the instructions of the company it did not invalidate the undertaking.
5. —*Liability of Agent*, for his failure to transmit the application, and the subsequent partial destruction of the crop, was the same as what would have been the liability of the company in that case, if the application had been forwarded and accepted.

An instruction construed to correctly state the measure of damages.

6. —*Duty of plaintiff to protect himself against defendant’s default*. Plaintiff not being informed of defendant’s failure to transmit the application, until after the destruction of his crop, was not prejudiced by his omission to seek other insurance.
7. EVIDENCE—*Expert testimony*. Farmers are competent to testify as experts as to what would have been the yield of a certain crop, destroyed while immature, if it had matured, with which, and with the land upon which it grew they are acquainted.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Messrs. TOLLES & COBBEY, for plaintiff in error.

Messrs. MELVILLE & MELVILLE, Mr. WALTER S. COEN, Mr. E. M. WALTON, Mr. F. B. TIFFANY, Messrs. MOONAN & MOONAN, for defendants in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action for damages for breach of contract, and was brought by B. E. Glazier against J. H. Mayhew. The National Union Fire Insurance Company was made a party defendant at the request of the defendant Mayhew. Upon trial, before a jury, a verdict was rendered in favor of the plaintiff and against the defendant Mayhew. The court directed a verdict in favor of the Insurance Company. Judgment was entered in favor of plaintiff and against the defendant Mayhew for \$450 and costs, and in favor of the Insurance Company against the plaintiff for costs. The defendant Mayhew brings the cause here for review.

The record shows that plaintiff filed his complaint on July 27, 1916, and on February 13, 1917, filed his amended complaint. The defendant Mayhew filed a motion to strike the amended complaint, upon the ground that the action, as shown by the original complaint, was one upon contract, and "that the amended complaint * * * seeks to recover damages for certain alleged torts." This motion was overruled, and error is now assigned to the overruling of the motion. We agree with the trial judge, in the following statement made by him, upon overruling a motion for a nonsuit: "The allegations of the complaint as amended, show that this is an action based upon a contract and an alleged breach thereof, to recover damages. * * * It is true there are certain allegations in the amended complaint from which a person might assume or infer that the action is not based upon contract, but is based on tort. Boiled down, the complaint alleges that the defendant agreed to do a certain thing and he failed to do that certain thing. * * *" The motion to strike was properly overruled. The allegations of the amended complaint are to the following effect: That on June 9, 1916, the defendant Mayhew solicited and obtained an application for hail in-

insurance from plaintiff on eighty acres of beans, and, in obtaining such application, agreed to and did accept plaintiff's promissory note for the premium, and further agreed to cause the policy of insurance to be issued by the National Union Fire Insurance Company and to become effective on the following Monday, June 12, 1916; but, notwithstanding such agreement on his part, defendant did not present or forward said application to the company, and no policy of insurance was ever issued; and that on Sunday, June 18, 1916, a storm of hail partially destroyed the crop of beans on the entire eighty acres; and that solely because of defendant Mayhew's failure and neglect to forward said application to the insurance company, the crop of beans had not been insured, and plaintiff had been damaged.

A demurrer was filed to the amended complaint, and overruled. Assignment of error No. II relates to the overruling of the demurrer to the amended complaint. The defendant Mayhew, after the demurrer was overruled, filed an answer, and proceeded to trial on the merits. This was a waiver of the right to object to the ruling on the demurrer, except as to that ground alleging failure to state a cause of action. 31 Cyc. 746; 3 C. J. 668, sec. 539. In this connection, the defendant Mayhew, the plaintiff in error, contends that the amended complaint shows that "in the transaction" the defendant Mayhew "was acting for the insurance company as its agent and whatever contract was made * * * was with said company." We do not so regard the complaint. The agreement relied on, in the complaint, is one alleged to have been made with the defendant in his individual capacity, whereby the defendant "would immediately forward" the plaintiff's application "to the home office of the company." It is further alleged "that solely because of defendant's failure and neglect to forward said application to the company's home office * * * plaintiff's said crop had not been insured." The complaint shows that the defendant Mayhew was the agent of the plaintiff for the purpose of forwarding the application for insurance to the insurance company. A cause of action is stated, and there was no error in overruling the demurrer.

At the trial, the plaintiff was permitted to amend the amended complaint by adding the word "partially" to an allegation of the complaint, so that the same would read: "A storm of hail partially destroyed plaintiff's crop." Error is assigned to the trial court's action in this respect, but if any error there was, the same, it appears from the record, was not prejudicial to the defendant. Furthermore, no objection was made to the amendment, counsel for the defendant merely stating: "I think it is quite late to make an amendment of that kind. We have been going on the theory all the time there was a total failure of the crop."

There are seventy-five assignments of error, in addition to those already considered. A great many of these are based upon the theory that the defendant Mayhew, in every part of the transaction with the plaintiff, was acting as the agent of a disclosed principal. This theory is erroneous, and it follows, from this circumstance, that many of the principles and authorities relied upon by the plaintiff in error are not applicable in the instant case.

There is no occasion for the application of the rule, stated in the brief of the plaintiff in error, that "no agent can be bound by a contract which he makes for his principal when he discloses his principal." The agreement of the defendant Mayhew was that he would promptly forward the plaintiff's application to the insurance company, and cause a policy of insurance to be issued. It appears self evident that as to such agreement, Mayhew was acting for himself and not for the insurance company. Counsel for the plaintiff in error state that "in this case the evidence of the plaintiff shows that Mayhew told him that he represented the insurance company." It may be assumed that the plaintiff understood that Mayhew was an agent for an insurance company, but that fact tends to prove rather than to disprove the existence of an agreement, such as that alleged in the complaint, between the plaintiff and the defendant Mayhew in his individual capacity. If the plaintiff believed that Mayhew was an insurance agent, he would naturally believe that such agent could cause a policy to be issued, and, if

desiring insurance, might give to such agent an application for insurance. Such was the situation between the plaintiff and the defendant Mayhew. The plaintiff desired hail insurance, effective at the earliest possible moment. He gave the defendant his promissory note, payable to the defendant himself, as payment for the premium, with the understanding that the defendant would cause a policy to be issued without any delay. The transaction occurred on June 9, 1916. According to the testimony of the plaintiff, he said to the defendant Mayhew: "Now, there is no ifs and ands in the way about this. I can get this insurance at the bank and I take no chances. I want this in full effect and force immediately if I give you this note." And to this, Mayhew replied: "I surely will have it done on Monday without fail; you will have your policy no later than Wednesday." In the matter of causing a policy of insurance to be issued, and taking prompt action for this purpose by immediately forwarding plaintiff's application for hail insurance to the insurance company, the plaintiff was relying upon, and dealing with, the defendant Mayhew in the latter's individual capacity. In these matters, Mayhew was not the agent of the insurance company.

The plaintiff in error further contends that if plaintiff's contract was with Mayhew personally, and not as agent for the insurance company, the contract was void as against public policy, and non-enforceable. In support of this contention, counsel cite *Ramspeck v. Pattillo*, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, which lays down the rule that an agent cannot make a valid contract where, in the same transaction, he acts as agent for both the insurer and the insured. This rule is not applicable in the instant case. The contract sued upon, alleged to have been made between the plaintiff and the defendant Mayhew, did not conflict with any duty Mayhew owed to the insurance company. Mayhew was the agent of the insurance company for the purpose of soliciting applications for hail insurance, but had no authority to issue policies. The insurance company gave Mayhew certain instructions as to amount of insurance and

the rates of premium, and authorized him to take notes for the premium. It permitted him to take a note running to himself and himself remit to the company the cash for the premium. The contract made between the plaintiff and the defendant Mayhew was not against the interests of the insurance company. It did not call for the issuance of a policy different from the policies usually issued. It did not deprive the company of any premium due it. Mayhew took the note of plaintiff to himself. His instructions from the company permitted him to do this, and he could remit to the company the cash premium rate, less 20% commission. Whatever duty he owed to the company, it did not preclude him from acting as the agent for the insured in the matter of causing a policy to be issued, and in the matter of immediately forwarding plaintiff's application for insurance to the company or to some agent authorized to receive and approve such application. This case falls within the rule, stated in 22 Cyc. 1445, that "the same person may act for different purposes as agent of the different parties to the contract so that for one purpose he may be the agent of the insured, although as to the procuring of the insurance he also represents the company."

As above indicated, we find that the alleged contract, upon which the plaintiff brought this action, was one made by the defendant Mayhew in his individual capacity and not as the agent of the insurance company, and that such contract is valid. As to whether or not such contract was actually made, the evidence was conflicting. The pleading and the evidence of the defendant was to the effect, among other things, that the agreement between the parties was not that the defendant Mayhew would cause a policy to be issued to become effective not later than Wednesday, June 14, 1916, but was, in substance, that the insurance company would first investigate the plaintiff's financial standing and would then either issue the policy or return to plaintiff his promissory note. The jury found the issues in favor of the plaintiff. If the contract alleged by the plaintiff was made, as the jury must have found that it was,

the evidence clearly establishes that the defendant Mayhew committed a breach of such contract, resulting in damage to the plaintiff. No policy of insurance was ever issued to the plaintiff, and therefore plaintiff's crop was not insured at the time the same was injured by a hail storm, on June 8, 1916. The defendant Mayhew admits, in his testimony, that he did not forward plaintiff's application for hail insurance to the insurance company promptly after receiving the same. There is no evidence that he ever did transmit the application to the insurance company or to its general agent at Denver for its or his approval or rejection. There is no evidence that the insurance company was in any way to blame for the fact that the plaintiff's crop was not insured at the time the hail storm occurred. The foregoing circumstances are sufficient to uphold the trial court's action in directing a verdict in favor of the insurance company. Because of the facts, and for the reasons hereinbefore stated, it may be here added that there was no error in denying the defendant Mayhew's motion for a non-suit which was interposed at the close of the plaintiff's evidence, and in denying his motion for a directed verdict which was interposed at the close of all the evidence.

The plaintiff's application for insurance was for hail insurance upon eighty acres of beans at fifteen dollars per acre, so that in case of the total destruction of the crop, over the entire field, the plaintiff would be entitled to receive twelve hundred dollars' insurance. The complaint alleges that on June 18, 1916, "a storm of hail partially destroyed plaintiff's said crop of beans." As to the measure of damages the court instructed the jury as follows: "You are instructed that if you find for the plaintiff, your verdict will be for such a per cent of twelve hundred dollars as the amount of beans destroyed bears to the total crop which would have been produced had no damage by hail occurred." The liability of the defendant Mayhew, with respect to loss or damage of the crop, is the same as that which would have fallen upon the insurance company had the insurance been effected as contemplated. 22 Cyc. 1449. The

defendant Mayhew became liable, if the jury found for the plaintiff, to pay such amount as would have been due under the insurance policy, provided the same had been procured. *Lindsay v. Peltigrew*, 5 S. Dak. 500, 59 N. W. 726; *Rezac v. Zima*, 96 Kan. 752, 153 Pac. 500. In the instant case, the liability of the insurance company, had a policy been issued, would not have been determined according to the usual rules relating to the measure of damages for the destruction of, or injury to, growing crops, but would have been fixed by the contract made between the insurer and the insured. The contract would have been to the effect as recited in the application, as follows: "It is agreed that in case of total destruction of the crop herein specified by hail, the amount per acre shall be paid by the company, and that in case of a partial damage, the company will pay the same percentage of the amount insured per acre as the grain destroyed bears to the crop, had no damage by hail occurred. Thus, if one-half of the crop insured is destroyed, the company will pay one-half of the amount of insurance per acre. * * * In our opinion, the instruction given conforms to this provision of the application, and therefore correctly states the measure of damages recoverable in this case. While the phraseology employed in the instruction differs from that used in the application, above quoted, it does not lead to any different result. The instruction is not objectionable because it fails to use the words "per acre." We find no error in the giving of the foregoing instruction. The trial court properly refused defendant Mayhew's requested instruction No. 20, which states that the measure of damages is "the value of the beans in their immature state, to-wit, June 18th, 1916."

The plaintiff in error further contends that the trial court erred in permitting certain witnesses for the plaintiff to testify by giving opinion evidence concerning the number of pounds or bushels of beans that would have been produced upon plaintiff's eighty acres of land if there had been no hail. In this connection, reliance is placed upon the rule that the opinion of a witness is inadmissible ex-

the rule that the opinion of a witness is inadmissible except where the witness is able to testify as an expert, and plaintiff in error claims that "this is not a case which involves peculiar skill or science," or, in other words, that the probable yield of plaintiff's land, if no hail had occurred, cannot be made the subject of opinion evidence. We cannot accept this view. "Expert testimony upon questions relating to agriculture and all of its various branches is admissible. * * * An expert may testify as to what crop specified land will yield under proper cultivation. * * *"

5 Enc. of Evidence, 533, 555. Farmers are competent as experts to testify to matters of opinion requiring peculiar knowledge of their particular callings. 11 R. C. L. 632, sec. 51; 2 Elliott on Evidence, 336, sec. 1061. In the instant case, it appears from the record that the witnesses in question were farmers, residing in the neighborhood where the plaintiff's field was situated, and had experience in raising and harvesting beans, and as farmers in general. They were sufficiently qualified to testify as experts, and their testimony concerning what quantity of beans the plaintiff's land would have produced if there had been no hail storm, was admissible as expert testimony. This view accords with numerous decisions. In *Farmers Nat. Bank v. Woodell*, 38 Oreg. 294, 61 Pac. 837, it was held proper to permit a witness to answer the following question: "From your observation and knowledge of growing beets last year and this, if your beets there, upon that place, in 1898, had been thinned, weeded out, hoed, and properly cultivated. * * * how many tons of beets to the acre would you have had?" In *Chicago, etc., Ry. Co. v. Longbottom* (Tex.), 80 S. W. 542, the plaintiff was permitted to introduce evidence to show what amount of cotton in the opinion of the respective witnesses certain land would have produced per acre if an overflow of water upon such land had not occurred. Such evidence was held competent. As to how much corn was or might be produced on a certain field, has been held to be a matter upon which a farmer, as an expert

witness, might express an opinion. 2 Elliott on Evidence, sec. 1061, p. 336.

It is claimed that the trial court struck out similar evidence offered by the defendant, but the record does not disclose this. The defendant was permitted to testify that plaintiff would have raised "about 300 pounds to the acre," if there had been no hail storm. He then added: "I base my calculations upon what neighbors done." It was only this last statement that was stricken, and properly so, because not responsive to the question propounded.

The plaintiff in error complains of the failure of the trial court to submit to the jury the defendant Mayhew's requested instruction No. 5, to the effect that after June 12, 1916, the plaintiff "was not justified in waiting for the policy; but that it was his duty to have at once made other arrangements for insurance." There was no error in the refusal of that instruction. There is no evidence that prior to the hail storm of June 18, 1916, the plaintiff knew or was advised that his application for hail insurance had not been transmitted to the insurance company, or that a policy of insurance had not been issued and was not in effect. According to the defendant Mayhew's own testimony he gave plaintiff no notice whatever, prior to the time of the hail storm, that no policy had been issued. It was the duty of the defendant Mayhew, if unable to procure the insurance, to notify the plaintiff that he could not do so. Under the circumstances existing in this case, as far as disclosed by the record, it was not error for the court to refuse to give an instruction upon the rule of avoidable consequences or the duty of plaintiff to prevent or reduce damages.

Other contentions of the plaintiff in error, not hereinbefore mentioned, are not of sufficient importance to require an opinion upon the points therein raised. We find no such prejudicial error in the record as would justify us in reversing the judgment.

The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9501.

THOMAS v. SELKREGG ET AL., EXECUTORS.

1. PRACTICE IN ERROR—*Law of the Case*. Where upon a second trial, after the reversal of the judgment first given, the facts shown are substantially the same as those presented at the first trial, the opinion of the court of review is the law of the case. It is not to be contended that the evidence is insufficient.
2. EXECUTORS AND ADMINISTRATORS—*Discharge of*, does not impair the right of the plaintiff in a pending cause to proceed to judgment.
3. PAYMENT—*Effect*. Action demanding \$3,000. Judgment for plaintiff for \$1,000. Plaintiff having brought error he was held entitled to the \$2,000 previously denied to him. Payment meantime of the \$1,000 had no effect to impair plaintiff's right of action.

Error to Denver District Court, Hon. A. Watson McHendrie, Judge.

Mr. JOHN T. BOTTOM, for plaintiff in error.

Mr. L. J. STARK, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS in an action *ex contractu* for money had and received, and was brought to recover the sum of \$3,000 which, it is admitted, was paid by the plaintiff to the testator of the defendants.

The first trial of this cause resulted in a judgment on a verdict for \$1,000, in favor of the plaintiff, and an instruction to the jury that the plaintiff could not recover the remaining \$2,000 of the amount sued for. The case was then taken to the Court of Appeals which, on review of the same, affirmed the judgment as to the recovery of the \$1,000, and remanded the cause for further proceedings as to the \$2,000. *Selkregg v. Thomas*, 27 Colo. App. 259, 149 Pac. 273. Thereafter, a second trial, as to the \$2,000 in question, was had, at which, and at the conclusion of the evidence for the plaintiff, the defendant moved for a directed verdict upon the ground, as stated in the motion, "that the plaintiff has not in a number of respects

made out the case that is alleged in his complaint." The motion was sustained by the trial court; judgment was rendered accordingly, and the plaintiff brings the cause here for review.

It is the contention of the plaintiff in error, plaintiff below, that the trial court, upon the second trial, did not follow the "law of the case" as announced by the Court of Appeals, and therefore erred in directing a verdict for the defendants.

The trial court directed the verdict upon the theory that a cause of action for money had and received was neither pleaded nor proven. The Court of Appeals, however, held that such a cause of action was pleaded, and that the evidence for the plaintiff, upon the first trial, made out a plain *prima facie* case for the plaintiff, and therefore reversed the trial court's action in denying plaintiff a recovery of the \$2,000, and remanded the case for further proceedings as to such sum. Upon the second trial, the facts in favor of the plaintiff were not only substantially the same as those shown upon the first trial, but the evidence made out even a better case. The defendants contend that the evidence was insufficient, but under the rules relating to the *Law of the Case* this point cannot be now urged. In 4 C. J. 1217, it is said: "* * * Where the facts shown on the second trial are substantially the same as on the first trial, the decision of the appellate court is binding on the lower court and it may and should in conformity with the decision of the appellate court, submit the case or certain issues to the jury, * * * or direct a verdict for plaintiff. * * * Where the Appellate Court has decided that the facts proved raised a question for the jury, it is error for the lower court on a second trial in which the same, or practically the same, facts are developed, to * * * direct a verdict * * * on the same ground on which it directed a verdict at the first trial." See also 2 R. C. L. 227, sec. 191. It was clearly error for the trial court to direct a verdict for the defendants.

The defendants in error contend to the effect that a correct result was reached by the judgment below, or, that the trial court would have been warranted in sustaining their motion, made at the beginning of the trial, to dismiss the case on the ground, as stated in the motion, "that the judgment was paid and satisfied" and that the defendants, who are sued as executors, have been discharged as executors and the estate of their testator closed by the probate court. We find no merit in this contention. At the time the executors were discharged, the litigation was still pending in the sense that steps were being taken toward suing out a writ of error to review the proceedings had upon the first trial. The executors themselves afterwards brought the case to the Court of Appeals. The mere fact that the executors were discharged did not and does not affect plaintiff's right to proceed with litigation pending and unsettled at the time of such discharge. *Smiley v. Cockrell*, 92 Mo. 105, 4 S. W. 443; 18 Cyc. 1192. As to the payment of the judgment for \$1,000, that fact does not, under the circumstances existing in this case, estop the plaintiff from continuing the litigation as to the \$2,000. It was insisted by the defendants themselves in their reply brief filed on the former review of this case, that plaintiff's right to recover the \$1,000 was based on a transaction separate and distinct from that involved in his claim of the remaining \$2,000 sued for. The Court of Appeals treated plaintiff's entire claim as one consisting of two separate items, one of \$1,000, and one of \$2,000. It is not admitted in the pleadings that the settlement of the \$1,000 judgment was an unconditional settlement of the whole litigation. Without detailing the facts involved in the contention now being considered, it is sufficient to say that the admitted facts relied on do not sustain such contention.

The judgment is reversed and the cause is remanded with directions to the trial court to enter judgment for plaintiff in the sum of \$2,000 with interest thereon at eight per cent. per annum from November 9, 1909.

Reversed and remanded.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9505.

CITY AND COUNTY OF DENVER v. UNITED CIGAR STORES
COMPANY.

Judgment affirmed on the authority of *Denver v. Frueauff*, 39 Colo. 20.

*Error to Denver County Court, Hon. Ira C. Rothgerber,
Judge.*

Mr. JAMES A. MARSH, Mr. THOMAS H. GIBSON, Mr. J. J. LIEBERMAN, for plaintiff in error.

Messrs. O'DONNELL & GRAHAM, Mr. GEORGE W. MUS-
SER, for defendant in error.

Mr. JAMES GRAFTON ROGERS, amicus curiæ.

Per Curiam:

The case is one involving the validity of an ordinance of the City and County of Denver, prohibiting therein the issuance of trading stamps, profit-sharing coupons and gifts of like or kindred character, in connection with the advertisement and sale of goods. The question has been absolutely, definitely and conclusively settled, in all of its phases, by the decision of this court in *Denver v. Frueauff*, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521. That opinion has stood as the law on this subject for this jurisdiction for upwards of fourteen years, and no attempt has meanwhile been made by legislation to amend or set aside the laws of our state under which such transactions were by this court upheld and approved. We adhere to that decision.

Judgment Affirmed.

No. 9525.

COUNTY OF LARIMER ET AL. v. CITY OF FORT COLLINS.

1. MUNICIPAL CORPORATIONS—*Powers*. A city having express authority to operate works of public utility, e. g., for supplying water, light, steam, electric power or the like, acts in a proprietary or business capacity and may lawfully sell any surplus of that which it produces.

And may at public expense construct the appliances necessary to convey such surplus to the place where there is a demand for it, even though to points without the municipal limits.

2. —*Contract construed*. The county applied to the city council for permission to connect with the city water-works, a pipe line without the city limits, to convey water to the non-residents of the city, agreeing that those using water therefrom should pay therefor, "at the schedule rates now or hereafter adopted"; that the costs of the connection, and the extension, should be paid by the county, and that "Whenever the service of said extension shall pay to the city an amount equal per annum to 20 per cent. of the cost thereof "the line should be conveyed to the city, and the costs of construction, "according to prices then prevailing", should be paid to the county. This petition was allowed and the line constructed and operated for a series of years. Action for the cost of construction under the last clause of the contract. *Held* a valid contract, not *ultra vires* and that the city was liable.
3. —*Prior appropriation*. There being no certainty that any expense would ever be incurred by the city, and no indebtedness created within the year in which the contract was made, *Held* that sec. 6633, Rev. Stat. was inapplicable and not controlling.
4. —*Public works*. The improvement was not a public work constructed by the city and it was not required that the work would be let to the lowest bidder.

Error to Larimer District Court, Hon. Robert G. Strong, Judge.

Messrs. LEE & SHAW, Messrs. STOW, STOVER & MANTZ, for plaintiffs in error.

Mr. FRANK J. ANNIS, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action brought by The Board of County Commissioners of the County of Larimer, and the successors in interest of one C. B. Andrews, deceased, against the City of Fort Collins, a municipal corporation, upon the contract hereinafter mentioned. A demurrer to the amended complaint was sustained. The plaintiffs elected to stand upon their complaint, and, judgment having been entered against them, they bring the cause here for review.

The principal question raised by the demurrer, and presented by the record for our consideration, is whether or not the contract sued upon is *ultra vires*.

The contract in question is evidenced by a certain petition of the County Commissioners and C. B. Andrews, and a resolution of the City Council of the defendant. The petition is dated December 2, 1901, addressed to the mayor and city council of the defendant, and so far as material, reads as follows: "The undersigned respectfully petition the City that they wish to lay a four-inch cast iron main from the present terminus of the City water works at the east end of Garfield Street, to the road on the west side of the County poor farm, so the water service may be had at the poor farm buildings and in the event of the land adjoining the water main shall be hereafter platted and added to the city that service may be had for the consumers thereunder, and respectfully ask permission to make connection with said water main for that purpose, agreeing that water meters will be used and the takers will pay for the use of water at the schedule rates that are now or may be hereafter adopted. It is further agreed that said extension shall be made under the supervision of the Water Superintendent of the City of Fort Collins. * * * It is purposed that if permission is granted to make this connection and extension the cost thereof shall be paid by the undersigned and whenever the service by said extension shall pay to the city in rents an amount per annum equal to 20 per cent. of the cost thereof, then the line shall be conveyed to the City and an amount equal to the expense of constructing the same according to prices then prevailing be refunded to the under-

signed and thereafter said main to be owned and maintained by the City of Fort Collins." The foregoing petition was granted by the City Council of Fort Collins, by a resolution, reading as follows: "*Resolved*: That the petition from the County Commissioners for an extension of the City water works to the poor farm be granted with the modification that the payment of the water taps and for the use of the water be made to the City and if the petitioners lay the main prayed for it is upon that express understanding." The complaint alleges facts showing that the water main was laid, and that the plaintiffs have done all that is or was required of them under the agreement, but that the city refuses to refund to them the money agreed to be refunded by it, in the agreement. The demurrer to the complaint goes no further than to question the validity of the contract. The principal ground of the demurrer is that the contract is *ultra vires* for the reason that (1) the water main in question "is and was constructed without the corporate limits of the city," and (2) that "the inhabitants then to be served and now served are wholly without the corporate limits of said city."

It is the contention of the plaintiffs in error that the contract sued upon is not rendered *ultra vires* by reason of the facts thus recited in the demurrer, and in support of this contention counsel rely principally upon the case of *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316. Whether or not that case is decisive of the instant case, it at least strongly supports the view taken by the plaintiffs in error. The contract there upheld, by this court, was one whereby the City of Colorado Springs agreed to furnish water from its mains to the city of Colorado City and its inhabitants. There can be no doubt that the contract involved in the instant case is not *ultra vires* from the mere fact that it provides for furnishing of water to consumers outside of the corporate limits of the city. *City of Colorado Springs v. Colorado City*, *supra*; *Pikes Peak Power Co. v. City of Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276, L. R. A.

1915-C 395. This much is conceded by counsel for the defendant city, but, in his brief, he states that "the sole objection" is "one respecting the right of the city to acquire pipe lines" constructed and laid, as stated in the demurrer, "without the corporate limits of the city."

Under the authorities already cited, and many others, it is well settled that a city in operating a water works system acts in its proprietary or business, and not in its political or governmental capacity, and in so acting is governed largely by the same rules that apply to a private corporation. From this proposition it follows, that, as stated in 19 R. C. L. 788, sec. 95: "When, * * * as a necessary result of carrying on a legitimate, public enterprise in a reasonably prudent manner a surplus of the material used or distributed is acquired, or a by-product created, a municipal corporation may lawfully engage in the business of disposing of such surplus or by-product for profit, without special legislative authority." In *Milligan v. Miles City*, *supra*, it was said: "If it has a present surplus of water, the dictates of common business prudence require that such surplus be sold, and the proceeds devoted to public use." It was accordingly held, in the case last above cited, that a municipal corporation having express authority to operate an electric light and power plant may lawfully as an incident thereto sell surplus steam, and, further, may at public expense lay the mains or conduits necessary to convey such surplus steam to places where there is a demand for its use. In that case the business of selling surplus steam was conducted entirely within the corporate limits, but a surplus product, like water or light, may, of course, be sold to consumers without the city, and, if so, mains or conduits may be laid to points without the city in order to convey the surplus produce "where there is a demand for its use." The laying of the mains and the furnishing of the water are both a part of the same business enterprise. There is no rule that limits the disposal of surplus products only to cases where it may be done without any expense whatever. In the *City of Henderson v. Young*, 119 Ky. 224, 83 S. W.

553, a suit was brought to enjoin the city from furnishing an electric light current to property outside of the city limits. The answer of the city admitted that it would be "subjected to expense in making the proposed extension." The court held, citing *Pike's Peak Power Co. v. Colorado Springs, supra*, that a statute authorizing cities of the third class to provide the city and its inhabitants thereof with light, etc., does not prohibit the city from extending its electric light service to points without the city limits, where it can do so with very little additional expense, and in such a way as to result in advantage to the city.

It seems clear, therefore, that a city may incur a reasonable expense as an incident to the sale of surplus water or other product to consumers without the corporate limits, and there is no reason why such expense may not be incurred as the result of taking over or acquiring a water main running beyond the corporate limits, under the circumstances existing in the instant case. The defendant city had the authority to contract, as it did, to pay for the water main involved in this action.

The complaint does not affirmatively show any facts or circumstances rendering the contract in question *ultra vires*. The complaint is, therefore, not demurrable upon the ground above considered. The contract is not upon its face necessarily beyond the scope of the authority of the defendant city, and will, in the absence of proof, be presumed to be valid. 28 Cyc. 675. *Brown v. Pomona Bd. of Education*, 103 Calif. 531, 37 Pac. 503.

Another ground of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action because it "does not appear from the complaint * * * that any appropriation * * * was ever provided" prior to the making of the contract sued upon. This ground is laid in reliance upon section 6633 R. S. 1908 (sec. 7352 M. A. S. 1912) which reads as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of

the corporation whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

Under the contract involved in the instant case, there was no certainty that any expense whatever would be incurred by the city under it. No indebtedness was to accrue until and unless the revenues derived by the city from the water main should for any one year equal twenty per cent of the cost thereof. Furthermore, the indebtedness or expense contemplated by the contract would not arise unless and until the contracting parties, other than the city, should perform the agreement out of which the debt might arise. No indebtedness was created in the year in which the contract was made. Under these circumstances the statute relied on by the city is not applicable or controlling. This conclusion is supported by the reasoning of the case of *Gas Company v. Leadville*, 9 Colo. App. 400, 49 Pac. 268. A municipality does not create an indebtedness by obtaining property to be paid for wholly out of the income of the property. *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723; sec. 2330, McQuillen on Municipal Corp.

The demurrer also raises the contention to the effect that the contract in question was in the nature of one for the construction of a public improvement, and that, therefore, to be valid, it would be necessary that the work be done by contract let to the lowest responsible bidder. This point may be disposed of simply by the observation that the water main involved in this case, and in the contract under consideration, was not a public improvement constructed or to be constructed by the city, nor by the aid of money provided by the city.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer.

Reversed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9531.

RYAN v. SCHOOL DISTRICT No. 2, DELTA COUNTY.

1. PLEADING—*Answer filed after time*, is not to be stricken out.
2. —*Irrelevant matter*. Plaintiff whose motion to strike the answer has been denied, is, under the statute, entitled to have stricken therefrom matter not properly belonging therein, and if this is denied him he is entitled to reply.
3. *Averment—Conclusions drawn from pleadings*. Action upon contract. Plea that the contract "as shown by the pleadings", was not to be performed within one year, *Held* not a statement of fact and not admitted by failure to deny it in the reply.
4. DAMAGES—*Violation of contract*. One who being entitled to employment for a time certain, under a contract, is denied such employment, may recover any diminution in what his income would have been if allowed to serve under the contract, even though he received other compensated employment for the period of his contract.

In any event he is entitled to nominal damages.

Error to Delta District Court, Hon. Thomas J. Black, Judge.

Mr. CHARLES A. MURRAY, Mr. E. C. CRAFT, for plaintiff in error.

Mr. F. M. GODDARD, Messrs. STEWART & STONE, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error brought suit against defendant in error, setting up in his complaint three causes of action: (1) For breach of contract to employ him for the school year of 1915-1916. (2) For expenses of a trip to Denver at the request of the president and secretary of said district; and (3) For the amount due on an order against said district given to plaintiff by his wife, for salary due her.

A demurrer to the first cause of action was overruled, and sustained as to the others. The defendant was ruled to plead within a stated time, but an answer was not filed until two or three days after the expiration of said time.

Some days later plaintiff moved for a default, which motion having been denied, he moved that the answer be stricken from the files. This also was denied, and he was ruled to reply within ten days. Instead of filing a reply, however, he moved that certain parts of the answer be stricken. After the time for filing a reply had passed, defendant moved to strike plaintiff's last mentioned motion from the files, and for judgment on the pleadings for want of a denial of affirmative matter in the answer. This motion was granted, and judgment entered for defendant. The cause is now here on error.

We find no error in the ruling on the demurrer. Neither the second nor the third count states a cause of action. The striking from the files of plaintiff's motion to strike out parts of the answer is not, ordinarily, according to good practice. *Wier v. Bradford*, 1 Colo. 15.

In this case it appears that the motion to strike from the answer must have been regarded by the court as unwarranted because not within the terms of the order made when the court overruled the motion to strike the answer from the files. In this order plaintiff was given ten days in which to reply to said answer.

The court evidently interpreted the word "reply" as including only a denial of new matter in the answer, or what is commonly known as a replication. We think this interpretation is too narrow. Plaintiff had the statutory right to reply or demur, and having failed to secure the striking from the files of the answer, he was entitled to have stricken from the answer any matter not properly belonging therein. He could not therefore be compelled to deny the allegations of the answer, some of which it appears he considered to be wholly out of place in the answer. When his motion to strike from the answer was denied, he should have been given an opportunity to file a replication. Moreover, we are of the opinion that the affirmative matters of defense in the answer are not such as if uncontradicted entitled the defendant to a judgment upon the pleadings. The first of said special defenses is that the plaintiff had

been employed in another school for the year 1915-1916. The exact amount of his salary defendant is not able to state, but alleges, upon information and belief, that it was in excess of the salary plaintiff would have received had his alleged contract with the defendant been carried out. It is true, of course, that if the plaintiff had employment during said year his damages recoverable under the contract sued on might be reduced to the extent of the salary received. Whether or not plaintiff suffered damage by the breach of said contract would not depend wholly on the amount he received in his new field of labor. He might be able to show that his net income was less than it would have been had he been allowed to teach under the contract with defendant. In any event, however, he would be entitled to nominal damages and his costs, if he established a breach of the contract with defendant.

The second special defense was that, "The parol agreement for the year 1915—1916, alleged by plaintiff to have been made between plaintiff and defendant, if made at all, was and is, as shown by the pleadings, an agreement that, by its terms was not to be performed or performance thereof begun within one year from the making thereof; and that no such agreement or any note or memorandum thereof was or is in writing, etc." This merely alleges that the contract sued on, if made at all, was and is, *as shown by the pleadings*, an agreement not to be performed within one year. This is merely a statement of the inference drawn by the pleader from the pleadings. It is not a statement of fact as to the contract, but a conclusion, which is not admitted by failure to deny by replication. Only facts pleaded are admitted in such case. *Denver Circle Ry. Co. v. Nestor*, 10 Colo. 403.

The court properly exercised liberally its discretion in holding that the answer, though filed after the time limited therefor, should stand, but applied to the motion for judgment a narrow and unwarranted rule.

The judgment is therefore reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9537.

EMERY v. WARD ET AL.

1. PURCHASE MONEY MORTGAGE—*Effect.* A mortgage of land executed by a purchaser thereof contemporaneously with the acquisition of the title, or afterwards as part of the same transaction, is entitled to preference over all other claims or liens through the mortgagor, even though prior in time. Plaintiff conveyed lands to Ward taking back a mortgage for the balance of the purchase money. A prior judgment against Ward, duly recorded, was held subordinate to the mortgage.

Error to Moffat District Court, Hon. John T. Shumate, Judge.

Mr. A. M. GOODING, for plaintiff in error.

Mr. W. B. WILEY, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFF below, plaintiff in error here, brought suit against Thomas Ward on a note for \$250.00, and to foreclose a trust deed given to secure its payment, on certain land in Moffat County. The Public Trustee and The Citizens Bank of Craig were joined as defendants. The bank claims an interest in the land based upon levy and execution sale thereof under a judgment against Ward. The deed of trust was foreclosed, but the right of plaintiff was made subject to that of the bank. That judgment is now here for review on error.

The essential facts are that in 1910 plaintiff, Lucy Ward Emery, sold the land in question to Ward. She was at that time a resident of Kansas, and the transaction was carried out through one Templeton. The purchase price was agreed upon at \$400.00, of which Ward paid \$150.00 in cash some time in December, 1910. The balance was to be evidenced by note, the payment thereof to be secured by a trust deed on the land, which is the basis of the foreclosure suit. On January 24th, 1911, Templeton, as agent for Emery, prepared the note, the trust deed and the war-

ranty deed. The waranty deed was sent for signature to Emery, but upon its return to Templeton he discovered an error in the description, drew another waranty deed, but bearing date of April 25th, 1911, and forwarded it to his principal for execution. On June 15, 1911, the warranty deed was delivered to Ward, and the note and trust deed to Emery. The trust deed was recorded on the 17th of June, 1911, but the warranty deed was not put on record until August 1st, 1911.

The judgment relied upon by the bank was secured against Ward in a justice court, and on March 20, 1909, a transcript thereof was filed with the Clerk of the District Court, and on the same day a certified copy thereof was duly lodged with the Clerk and Recorder of the proper county. On August 14, 1911, execution was levied upon the land in question, which was sold thereunder, and on July 19, 1912, a deed by the sheriff therefor was made to the bank.

On August 24, 1914, this action was brought to foreclose the deed of trust. A disclaimer was filed by the Public Trustee and the bank failed to answer. Judgment by default was entered against Ward on March 30, 1915. The default as to the bank was later set aside and it answered. At the trial the facts were found to be substantially as stated above.

The question then is whether the evidence shows that the trust deed was given as security for the balance of the purchase price. Upon the whole record, and particularly from the fact of the simultaneous delivery of the waranty and trust deeds, and from oral testimony introduced, it is plainly apparent that such indebtedness was for a balance of the purchase price of the land, and constituted a vendor's lien thereon. Indeed, that such is in fact the case is practically undisputed.

It is well settled both on principle and authority that a purchase money mortgage takes precedence over a judgment against the mortgagor. The rule is stated in 27 Cyc. 1180, in the following terms: "A mortgage given for the

unpaid balance of purchase-money on a sale of land, simultaneously with a deed of the same, and as a part of the same transaction, takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor, to the extent of the land sold, thus outranking a mortgage previously given by the same mortgagor before he took title to the property but expressed to cover after acquired property."

In discussing the question in *Curtis v. Root*, 20 Ill. 53, it was said: "It is a principle of law, too familiar to justify a reference to the authorities, that a mortgage given for the purchase money of land and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during this instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase money."

It is argued, however, that the warranty deed and the trust deed bear different dates, that the trust deed was recorded first, and therefore there is nothing of record to put the bank upon notice that the two papers were parts of the same transaction. As to the first contention, that the deeds bear different dates, the general rule is as stated in 19 R. C. L. 416, § 196, as follows: "It is a general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquirement of the legal title thereto, or afterwards, but as a part of the same transaction, is a purchase money mortgage, and entitled to preference as such over all other claims or liens arising through the mortgagor though they are prior in point of time; and this is true without reference to whether the mortgage was executed to the

vendor or to a third person. The reason for the rule most frequently given is that the execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and without stopping, vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title. The deed and mortgage need not be executed at the same moment, nor even on the same day, to make them contemporaneous, provided they are parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties."

The argument that the bank is entitled to rely upon the record as to title, and the incumbrances on the land, has no force because its judgment against Ward was secured long prior to the time when the latter took title. The bank parted with nothing upon the strength of what was upon the record as to the title. What rights it had it still has. It is firmly established that public records so far as notice be concerned have no bearing upon rights of antecedent claimants.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment for the plaintiff making her lien upon the land paramount to any right of the bank therein.

Judgment reversed and cause remanded with directions.

Mr. Chief Justice Garrigues and Mr. Justice Allen concur.

No. 9551.

GALVIN v. STOKES ET AL.

ESCROW—Violation of Conditions. Until performance of the conditions of a deposit in escrow the title to whatever is to be conveyed remains in the grantor; and if he died before the performance of the conditions the title descends to his heirs, subject only to the purchaser's contract.

Defendant company by threats of a criminal prosecution against one with whom plaintiff was associated in business induced plaintiff to deposit in escrow a certified check, upon an agreement that if a criminal proceeding then pending should not be dismissed the check should be returned. The criminal proceeding was not dismissed, but the escrow holder nevertheless delivered the check to the payee, who obtained the money thereon.

Held that plaintiff was entitled to recover the amount of the check.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Mr. S. J. SACKETT and Mr. C. A. IRWIN, for plaintiff in error.

Mr. ARCHIBALD A. LEE, for defendants in error.

Mr. Justice Scott delivered the opinion of the court.

THE complaint in this case, in so far as is important to consider, alleged that plaintiff and one Fred C. Bartle were the sole owners of the capital stock of the Merchant's Transportation Company, engaged in business in the city of Denver, and that Bartle was the general manager of said corporation, and that his personal services were necessary to the success of the business of the corporation; that the defendant, the Denver Transit and Warehouse Company, represented to plaintiff that Bartle, while in the employ of said company, had embezzled \$5,000 of its money, and threatened to prosecute Bartle criminally, and to levy attachments on the property and business of said Merchant's Transportation Company, and thereby destroy its business, unless the plaintiff should deliver to the defendant, Charles A. Stokes, attorney for the defendant company, her certified check drawn on a Denver bank, for two thousand dollars, and unless the said Bartle should secure an additional sum of three thousand dollars; that under such circumstances she did deliver to said Stokes her certified check for \$2,000 in escrow and received therefor the following escrow receipt: "This is to certify that I have received from Fred C. Bartle a note for \$3,000 secured by

a mortgage upon land in Jefferson County, Colorado, and I have also received from Maud Galvin a certified check for \$2,000, which note, mortgage and certified check are deposited with me upon the following conditions, viz:

"That the said Fred C. Bartle is indebted to the Denver Transit and Warehouse Company in the sum of \$5,000 and criminal proceedings have been instituted against him through the office of the District Attorney and are now under his control.

"Now if the said District Attorney is willing to dismiss the said proceedings, the foregoing note, mortgage and certified check are to be turned over to, and delivered to, the Denver Transit and Warehouse Company in settlement of, and in full satisfaction of, their claim against the said Bartle; but if the said District Attorney refuses to dismiss said proceedings, then the said note, mortgage and certified check shall be returned to Fred C. Bartle and Maud Galvin.

"Dated at Denver, Colorado, this 16th day of October, A. D. 1913.

"(Signed)

CHARLES A. STOKES."

The complaint further alleges that the criminal prosecution was not dismissed and the said certified check was wrongfully delivered to and cashed by the defendant company. Prayer was for judgment for the amount of said check with interest.

The defendants filed their demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against the defendant. The demurrer was sustained by the court and the plaintiff, electing to stand upon her complaint, brings the case here on error.

This matter was before the court on the petition of Bartle and his wife to cancel their note and mortgage given by them in the same transaction. *Bartle v. Bond*, 65 Colo. 367, 176 Pac. 832. The court there said: "It is clear that said instruments were executed at the demand of the defendant company, and in accordance with an agreement

evidenced by said escrow receipt. In determining what was the consideration of such agreement, it is wholly immaterial whether or not the sum claimed by the company was due. An agreement to give security for a debt is a matter quite apart from the transaction in which the debt was incurred.

"An agreement to give security may be void, and the debt continue as a legal obligation.

"From the escrow agreement it is plain that the dismissal of a criminal prosecution was the condition upon which the papers were to be delivered by Stokes; and the agreement to dismiss was the inducement—the consideration—for their execution and deposit with him.

"The agreement was contrary to public policy and void.

"The plaintiff was therefore entitled to have the note and trust deed cancelled, and the court erred in rendering judgment against him." A proper interpretation of the opinion in that case makes it controlling in the case at bar.

It is not claimed that the plaintiff in this case was indebted to the defendant company in any sense, or had knowledge of the alleged embezzlement of Bartle except as claimed by the defendant company at the time of this transaction. It would therefore be a singular sort of justice for this court to cancel the obligation of the alleged debtor and wrongdoer and to permit the defendant company to retain the money of the plaintiff. We find no principle of law by which such latter holding may be sustained.

Counsel for defendant bases his argument upon the following proposition: "The case as now presented to this court in plaintiff in error's opening brief is a plain case of attempted recovery of money paid to compound a felony." If this were a correct statement of the facts in this case, an entirely different proposition would be presented. But the admitted fact in this case is that the plaintiff did not pay to the defendant money to compound a felony, nor for any other purpose, nor at all. Assuming such incorrect premise, counsel then proceed to invoke the doctrine of *In pari delicto potior est conditio defend-*

entis, so frequently considered by this court and the Court of Appeals.

The doctrine is expressed in different form in the several cases, but in substance it is the same in all. Counsel for defendant cite it and rely on the expression in *Branham v. Stallings*, 21 Colo. 211, as follows: "*In pari delicto portior est conditio defendentis*",—"In equal guilt, the stronger is the situation of the defendant", is a maxim of the law, or as it is sometimes expressed, 'Where misconduct is mutual, the law will not lend its aid to either party.' This rule was not adopted for the benefit of defendants, but simply upon the grounds of public policy. Subject to a few well known exceptions, the law is well established that where such a contract is executory the law will not aid either party to enforce its execution, and where it has been executed, or money paid in pursuance thereof, the law will not aid the party to recover back the amounts paid."

It will be noticed in that case, as in all similar cases cited, the money or consideration was voluntarily paid or delivered, and the action was to recover back that which was so voluntarily and actually delivered, or to enforce an executory contract.

In this case the check was not delivered in accordance with the agreement, but in violation of it, therefore without any authority at all, and without the knowledge or consent of the plaintiff, and in direct violation of the express pledge of the escrow holder, who was for such purpose the joint trustee of the parties. How can it be said, then, that the delivery of the check was a voluntary delivery or a voluntary payment, so vital in the application of the doctrine relied on? It can be no different in principle than if the check had been stolen from the possession of the plaintiff and delivered by the thief to the defendant corporation, which then cashed it. Such circumstance would have constituted an equally voluntary payment as under the facts in the case at bar.

It is contended that the escrow agreement being void as in contravention of public policy, the plaintiff may not rely

upon its terms to establish the status of the parties showing the absence of the delivery of the check in question. While the escrow receipt is void and non enforceable, it is of itself the best evidence of that fact and is likewise the best evidence of the acts, intent and purposes of the parties, and in the absence of contrary evidence, is conclusive evidence of the fact that the check was not to be delivered to the defendant except upon the happening of a certain contingency, which the admitted allegations of the complaint show never happened. Hence the check in this case was not lawfully delivered and therefore not authorized by plaintiff to be delivered or paid. Therefore, the doctrine of "*In pari delicto portior est conditio defendantis*" cannot apply.

Our negotiable instrument law expressly provides that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument, for the purpose of giving effect thereto. This was likewise the rule at common law.

It is a settled principle of the law that until the performance of the condition of an escrow agreement, the title to land to be conveyed remains in the grantor, and further, that if the grantor dies before the happening of the certain event or performance of the condition, the title descends to his heirs subject only to the purchaser's interest. It follows, therefore, that an escrow given to the grantee or obligee by the depositary before the compliance with the conditions or before the happening of the event stipulated, passes no title and gives no right to the obligee. 16 Cyc. 578, 579. This doctrine was announced in *Wolcott v. Johns*, 7 Colo. App. 360, 375, and it was there said: "The deed to the property, and the notes for its price, were placed in the hands of Mr. Butler to be held by him until the performance of a certain condition by Johns. Upon the performance of that condition, Butler was to deliver the deed to Wolcott and Henderson, and the notes to Johns, and in event of the refusal or impossibility of performance, it would have been his duty to return the papers to

the parties respectively from whom he received them. Until performance, the instruments were entirely ineffective, for any purpose; there was no conveyance and there was no obligation upon the notes; the estate with all its incidents remained in Johns; if he had died in the meantime it would have descended to his heirs; it was subject to attachment for his debts, and a creditor levying upon it would hold it in preference to the grantees named in the deed."

If we follow the rule that if in a case where parties enter into a forbidden contract, the law will leave the parties where it found them, then in this case, it found the plaintiff's check in the hands of an escrow holder, undelivered and without authority to deliver, and therefore not lawfully cashed or paid. The delivery and cashing of the check was solely through the unauthorized and willful wrong of the defendants, hence the plaintiff is entitled to recover from them for these wrongful acts. The law will not permit them to so take advantage of their own fraud.

It is true that the plaintiff placed herself in a position where she could be imposed on by another, but in such case the doctrine of *In pari delicto* has been expressly held by this court not to apply. *Branham v. Stallings*, *supra*, where it is said: "The exceptions cover cases of usurious contracts, marriage brokerage contracts, and the like, where the transactions are prohibited for the sake of protecting one set of men from another, the one from their condition or situation being liable to be imposed upon by the other, as in such cases the parties are not *in pari delicto*, and it is assumed that public policy will best be advanced by granting relief. 2 Pomeroy's Eq. Jur., sec. 941, and cases cited in note." But we are also convinced that the complaint alleges facts sufficient to constitute a charge that the check was obtained by duress, and was therefore without consideration and void.

The judgment is reversed with instruction to proceed in accordance with the views herein expressed.

Garrigues, C. J., and Denison, J., concur.

Denison, J., concurring specially.

Whether the check was delivered by the trustee in accordance with the contract seems to me immaterial, because, since the contract was void, such delivery was without authority whether according to the contract or not.

The question before us, however, has nothing to do with the delivery or non-delivery of the check by the trustee. The question is whether the delivery of the check to the trustee on the terms of the contract was such an unlawful act as to place plaintiff *in pari delicto* with the trustee and the D. T. & W. Co. If it was, she cannot recover, if not, she can, and the case should be reversed.

It is true that the parties to an unlawful agreement are ordinarily *in pari delicto*, but where one of them is brought into the delict by duress by the other the entry is not voluntary and so they are not *in pari delicto* and the maxim *potior est conditio defendentis* does not apply in favor of him who is guilty of such duress.

In the present case the threat of the criminal prosecution of plaintiff's partner to the ruin of plaintiff's business was duress, analogous to duress of goods, so that she cannot be said to have entered the unlawful transaction voluntarily. For the principles here involved see Judge Elbert's discussion of duress of goods in *Adams v. Schiffer*, 11 Colo. 15, 30-34, and cases cited, especially *Chase v. Dvinal*, 7 Me. 134.

For these reasons I think the case should be reversed.

No. 9569.

POPEJOY v. DIEDRICH.

BANKRUPTCY—Construction of Statute. The provisions of the Bankruptcy Act concerning the discharge of the bankrupt from his liabilities are to be strictly construed. The bankrupt who fails to use due diligence to ascertain the residence of a creditor, and so fails to give his residence in his schedule is not discharged of the debt.

Error to Rio Grande District Court, Hon. Jesse C. Wiley, Judge.

Mr. JAMES P. VEERCAMP, for plaintiff in error.

Mr. JESSE STEPHENSON, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error had a judgment, obtained in a County Court, against plaintiff in error, and while it was in force the latter became an involuntary bankrupt. Said judgment was scheduled as held by Diedrich, whose residence was stated to be unknown. Some time after Popejoy's discharge in bankruptcy, Diedrich, who had no knowledge of the bankruptcy, caused a transcript of the judgment to be filed with the County Clerk of a county in which Popejoy had acquired real estate.

Popejoy then brought suit to cancel said transcript as a cloud on his title. The defense was that the schedule was defective, in that the debt was not properly described, and that defendant's residence was given as unknown. Judgment was entered for the defendant and the cause is now here on error.

Plaintiff, on the trial, testified, that being ignorant of Diedrich's address, he wrote to an attorney at Monte Vista who had represented Diedrich in the action in which the judgment was entered, asking for said address, and that the attorney replied that he did not know Diedrich's address. This attorney, who now represents plaintiff in error, testified that he could not recall receiving the letter, and that in fact he did know Diedrich's address. It appeared that both the parties to this action formerly lived in the vicinity of Monte Vista and that before the bankruptcy proceeding both of them had moved away, plaintiff in error to Pueblo and Diedrich to Montana. Upon this state of the evidence, the trial court found that the plaintiff had not used due diligence to ascertain the address of Diedrich, and that, therefore, the plaintiff had not been discharged from the debt by his discharge in bankruptcy.

Plaintiff in error now contends that this finding by the court was not supported by the evidence.

It is settled by numerous authorities that the portion of the bankruptcy law concerning discharge from debts is to be strictly construed, and that the steps required to be taken must be shown to have been taken in order to give one the benefit of the statute. In *Parker v. Murphy*, 215 Mass. 72, the court said: "The requirement for duly scheduling the names and residences of creditors is a most important one. It is in compliance with the generally recognized principle that one shall not be barred of his claim without the opportunity of having his day in court. It is for the benefit of the creditors and in the interest of fair dealing with them and is to be construed in harmony with this purpose. It is essential in order that notice in the bankruptcy proceedings may be sent him. It has been construed with some strictness. *Birkett v. Columbia Bank*, 195 U. S. 345; *Custard v. Wigderson*, 130 Wis. 412. * * * The want of knowledge which will excuse a debtor from putting the residence of his creditor in the list is not that which may exist without attempt to gain the information, but that which arises after reasonable effort has been made to find out."

It was the province of the court to determine whether or not plaintiff in error had exercised due diligence to ascertain the address of Diedrich, and under the authorities his finding in that respect was fully justified. The judgment is accordingly affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9609.

HOOVER v. SHOTT.

1. TORT—*Damage—Non-suit.* One complaining of a tort and failing to show any damage therefrom is properly non-suited.

2. DAMAGES—*Measure of*, in an action for the destruction of a growing crop, is the value of the crop at the time and place of the injury.

The evidence examined and held insufficient to establish the damages occasioned by the tort complained of.

3. EVIDENCE—*Expert Testimony*. One called to give an opinion as to the value of property must be shown to have had means to form an intelligent opinion upon the matter.

Whether a witness offered for such purpose shall be permitted to give his opinion is largely within the discretion of the Court.

Error to Mesa County Court, Hon. N. C. Miller, Judge.

Mr. W. S. FURMAN, for plaintiff in error.

Messrs. WALKER & HECKMAN, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

PLAINTIFF in error originally instituted this action before a Justice of the Peace, from the judgment of whom, in her favor for \$90.00, she appealed to the County Court of Mesa County. At the trial in that court, at the conclusion of her evidence, a non suit was entered, from which judgment she brings error.

The facts in the case, as nearly as they can be determined from the defective record and the unsatisfactory brief of plaintiff in error, appear as follows: The plaintiff is the owner of a tract of land in Mesa County, upon a part of which was located a vineyard. A fire was started upon the land of the defendant, immediately adjoining, by the defendant, or her servants, which fire was alleged to have been permitted negligently to escape in the wake of a strong wind to the vineyard of plaintiff, where it destroyed and injured the vines upon approximately two and one-half acres.

At the trial, the negligence and liability of the defendant were *prima facie* established, but the court rejected or struck out the testimony of all the witnesses by whom the plaintiff sought to prove damages, on the ground that the witnesses were not shown to be competent to testify as to

the value of the land either before or after the fire, or as to the extent of the damage measured without reference to the land value. If the court did not err in rejecting such testimony, the plaintiff, when she rested her case, had established a cause of action but had failed to show any damage, which was an essential part of her case, and consequently a non suit was proper. *Schon-Klingstein Co. v. Snow*, 43 Colo. 540, 96 Pac. 182; *Tripp v. Fiske*, 4 Colo. 24; *Stratton v. U. P. R. R. Co.*, 7 Colo. App. 126, 42 Pac. 602; *Smuggler Union Co. v. Kent*, 47 Colo. 320, 112 Pac. 223.

The plaintiff sought to establish two elements of damage: First, the value of the crop of grapes that was destroyed by fire; and second, the permanent injury to the land occasioned by the fire. The correct measure of damage for the first element was the value of the crop at the time and place of destruction. *Colo. Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *North Sterling Irr. Dist. v. Dickman*, 59 Colo. 169, 49 Pac. 97; *Roberts v. Lehl*, 27 Colo. App. 351, 149 Pac. 851. In the *Colo. Con. L. & W. Co. v. Hartman* case, *supra*, it was said: "Upon principle this would seem to be the true rule of compensation—the value of the crops at the time of their destruction. * * * The trouble is in arriving at the value of an immature growing crop. If it had an established market value, the task would be an easy one; as it has not, the value and evidence establishing it is more or less speculative, and a crop before maturity is subject to so many possible injuries, that great care should be exercised not to give it a prospective or speculative value. But in order to establish the value at the time of the destruction courts are compelled to resort to several methods of computation, and either, or all combined, may afford a fair basis. One might be a year's rental value, with the cost of planting and bringing forward the crop until the time of its loss; another, what the crop would bring in its immature state at a sale; and a third, the proof of the average yield and the market value of crops of same kind planted and cared

for in the same manner, less the cost of maturing, harvesting and marketing. While neither would afford positive proof, they would all seem to be proper, and the only way by which a jury could get the necessary data upon which to base a verdict."

In the case at bar, the plaintiff established the number of vines that had been destroyed, and an estimate of the average yield per vine, with the approximate market value of other grapes upon maturity that same year, evidently in an effort to follow the third method of proof mentioned in the Hartman case, *supra*. But there was an entire absence of any proof of the cost of maturing, harvesting and marketing. In addition, there was testimony that, subsequent to the fire, and prior to the time of maturing, some of the grapes and vines which were not injured by the fire had been destroyed by frost. It was not shown whether the burned portion would have suffered the same fate, in all probability, had it escaped the fire, but the testimony resulted in leaving the question as to the probability of the crop maturing at all in a decidedly uncertain state. Under these circumstances, the only value the jury could have determined from the evidence before them was the value of the destroyed crop at maturity, which would not have been the proper measure of damages, as seen in the cases cited above.

As to the second element of damage, the plaintiff herself and three other witnesses were introduced to establish the value of the land immediately before and immediately after the fire, the difference between which values was a proper element in the measure of damages. *Mustang Co. v. Hissman*, 49 Colo. 311, 112 Pac. 800; *Colorado Springs Co. v. Albrecht*, 22 Colo. App. 201, 123 Pac. 957. The plaintiff testified that she did not know the value of the land at either time. The court excluded the testimony of the other three witnesses as to value, on the ground that they were not shown to be competent to testify in that regard.

The rule as to the competency of witnesses to state an opinion concerning the value of property is stated in *Butsch*

v. Smith, 40 Colo. 64, 69, 90 Pac. 61, where it is said, quoting from Rogers on Expert Testimony, § 152: "Whenever it is desired to have the opinions of a witness on the subject of value, it is always necessary whether the witness is offered as an expert or not, to lay some foundation for the introduction of his opinion, by showing that he has had the means to form an intelligent opinion, 'derived from an adequate knowledge of the nature and kind of property in controversy, and of its value.'"

As in that case, it is clear that no one of the witnesses called by plaintiff for this purpose, qualified as an expert, and it is equally clear that the testimony of all three of them on this point was incompetent, as not being based upon an adequate knowledge of the property in controversy or its value, or the means of forming an intelligent opinion.

It is said in *Rimmer v. Wilson*, 42 Colo. 180, 184, 93 Pac. 1110, that: "The sustaining or overruling of objections to testimony of witnesses as to the value of property which is in almost universal use, when such objections are based upon the qualification of the witnesses to answer the question, is a matter largely within the discretion of the trial court."

In the case of *Insurance Co. v. Ross Lewin*, 24 Colo. 43, 53, 51 Pac. 488, 65 Am. St. 215, the case of *Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035, is cited, from which the following is quoted with approval: "Whether a witness called to testify to any matter of opinion, has such qualifications and knowledge as to make his testimony admissible, is a preliminary question for the judge presiding at the trial; and his decision is conclusive unless clearly shown to be erroneous in matter of law."

It is quite evident that the trial court, in excluding the testimony of the witnesses as to the value of the land, did not abuse the discretion vested in him, and this court, consequently will not disturb his ruling.

It may well be said in this case as in *Tripp v. Fiske*, supra: "So meagre and unsatisfactory is the evidence

that is pertinent to the plaintiff's right to recover, that the court below was, as this court certainly is, unable to say that the plaintiff's case was made out."

Judgment affirmed.

Garrigues, C. J., and Denison, J., concur.

No. 9616.

BEAVER PARK LAND & WATER COMPANY v. COWIE.

1. DIRECTED VERDICT—*Non-suit*. Where the plaintiff produces evidence sufficient to go to the jury neither a non-suit nor a verdict for defendant can be directed.
2. PLEADINGS—*Amendment—Diligence*. Leave to amend an answer is properly denied where it appears that at the filing of the original the defendant was sufficiently advised of the matters properly introduced by amendment.
3. EVIDENCE—*Relevancy*. Plaintiff attached an auto car as the property of defendant. Defendant's wife intervened, claiming the car. Plaintiff offered to show that defendant had used the car in its service, and received an allowance therefor. *Held* properly excluded, as having no tendency to prove whether defendant owned, leased, or borrowed the car.
4. PRACTICE IN ERROR—*Objections not taken below*. A document was offered for the intervenor, and admitted with a qualification. It was afterwards admitted without qualification. Plaintiff failing to ask an instruction upon the question, at the close of the evidence, waived the error so committed.

Department One.

Error to Fremont District Court, Hon. James L. Cooper, Judge.

Mr. CLARENCE C. HAMLIN, Mr. JAMES H. ROTHROCK, Mr. W. D. ROSS, for plaintiff in error.

Mr. GEORGE H. WILKES, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

THE plaintiff in error is hereinafter designated as "the company," defendant in error as "intervenor," and Archibald Cowie as "defendant."

In January, 1919, the company brought suit against the defendant for the sum of \$14,458.74, and thereafter, under writ of attachment, on Overland automobile, here in question, was levied upon as defendant's property. Intervenor, the wife of defendant, then filed her petition herein alleging ownership of the automobile. This question of ownership was tried to a jury which returned a verdict for intervenor, fixing the value of the automobile at \$850 and intervenor's damage at \$150. Judgment was thereafter entered upon this verdict and such further proceedings had that the cause is now regularly before us for review on error.

Burke, J., after stating the case as above.

Five alleged errors of the trial court are discussed in the brief of counsel for the company. The first two relate to the court's refusal to enter a non-suit, or direct a verdict for the company. There was sufficient evidence to require the submission to the jury of the question of ownership, hence those motions were properly overruled.

At the close of the evidence plaintiff moved for leave to file an amendment to its answer to the petition in intervention. It sought thereby to set up that at the time intervenor claimed to have acquired ownership of the automobile in question the company was an existing creditor of defendant, and that defendant's pretended transfer to his wife of any interest he may have had in the automobile was in fraud of the company's rights. At the same time the company moved for a continuance of the trial on the issue of ownership until after the trial of the main cause, that it might therein establish the fact that it was such creditor at the time alleged; and for the further reason that it had not then and there present its witnesses to establish such fact, and was not prepared to go to trial thereon. This motion to amend was overruled and that ruling is assigned as error. We cannot so hold.

The president of the company was shown to have been cognizant of the wife's claim to the car, and that she held a bill of sale therefor, prior to the levy of the attachment. It thus appears that the company was in possession of sufficient information to have included in its original answer to the petition of intervention the matter which it thereafter sought to set up by amendment. In any event its motion should have been made at the close of intervenor's evidence or be held waived. The motion to amend having been properly denied no cause for a continuance existed.

Defendant had been an employee of the company and had used the automobile in question in the discharge of his duties under that employment. The company sought to show a contract with him providing an expense allowance for the use of an automobile, as tending to show that the car in question belonged to the defendant. This evidence the court excluded and upon that ruling error is predicated. The ruling was correct. Such evidence would have no tendency to prove whether defendant owned, borrowed or leased the car so used.

The company offered in evidence Exhibit "1," a certified copy of an application for an automobile license. The application was made by defendant and the car for which it was made was a Moon roadster, also claimed by intervenor, and forming one of the links in a series of trades upon which she based her claim of ownership to the Overland in question. The exhibit was admitted with the qualification that intervenor be shown to have had knowledge thereof. This ruling, and the remarks of the court thereon, are assigned as error. It is unnecessary here to determine the question. The exhibit was later re-offered and admitted without the qualification. If the company was not satisfied with this action it should have tendered a proper instruction on the subject at the close of the evidence. Having failed to do so it waived the error, if any there were. The judgment is accordingly affirmed.

Garrigues, C. J., and Teller, J., concur.

No. 9617.

SAN LUIS VALLEY DRAINAGE DISTRICT NO. 1 v. STANLEY.

CONTRACT—*Construed.* An attorney was employed by the drainage District, "until its final completion." *Held*, to import the organization and establishment of the district, as a legal entity, and not the completion of the drainage works contemplated.

Error to Conejos District Court, Hon. Jesse C. Wiley, Judge.

Mr. R. K. BROWN, Mr. CULVER A. GREEN, for plaintiff in error.

Mr. ALBERT L. MOSES, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action by an attorney at law against a client to recover a balance alleged to be due under a contract for compensation, and also to recover the amount of expenses incurred by him in the performance of the professional services required by the contract. As to both matters, the plaintiff prevailed in the trial court, and defendant brings **error.**

The main question presented upon this review, is whether or not there was a complete performance, under the contract, on the part of the plaintiff.

The defendant is a drainage district, organized and existing under chapter 124, page 311, Session Laws of 1911 (sec. 3647 et seq. M. A. S. 1912). The contract in question was made by the board of directors of the defendant district on April 12, 1912, and, so far as material here, is, in the terms of a resolution appearing in the record book of the defendant, as follows: "It was moved and seconded that Fred D. Stanley be retained and employed as counsel for the drainage district until its final completion, including such litigation as may arise in connection therewith, at a compensation of two thousand five hundred (2,500) dollars plus actual disbursements made in the way of expenses. * * *"

It is the theory and contention of the plaintiff that the words "final completion," as used in the contract, refer

to the completion or establishment of the drainage district, as a legal entity. It is conceded that such completion was brought about long prior to the bringing of this action, and that under plaintiff's construction of the contract he is entitled to recover the unpaid portion of the contract price for his services.

On the other hand, the defendant contends that the words "final completion" refer to the completion of the ditches or of the drainage system. It is admitted that no drainage system had ever been established, and for that reason the defendant claims that the balance of the agreed compensation is not yet due. The defendant proceeds upon the theory that the contract is ambiguous, and therefore invoke various rules of construction.

In our opinion there is no ambiguity, and the words "final completion" refer to the district and not to a drainage system. Grammatically, there is no ground for any other conclusion. It was the completion of the organization of the district that was contemplated by the parties, according to the plain language of the contract. The plaintiff was first retained by the promoters of the district, in 1909, and brought about the organization of the district. The resolution or contract made after the organization of the district ratified such previous employment, and under that contract the plaintiff took further steps towards effecting a "final completion" by bringing an action in the District Court to confirm the proceedings relating to the organization of the district, and obtained a decree, to that effect, on Feb. 3, 1913. We therefore hold that there had been a "final completion" of the district, under the terms of the contract, and that plaintiff was entitled to recover.

We find no reversible error in the record. The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9619.

ZALL JEWELRY COMPANY ET AL v. STODDARD ET AL.

1. PRACTICE IN ERROR—*Defects in Bill of Exceptions, Abstract and Assignment of Error*, precluding an intelligent examination of the contentions of plaintiff in error, the judgment was affirmed.

The rules of court and many cases decided in this court and the Court of Appeals, upon questions of practice, cited.

Department One.

Error to Denver District Court, Hon. S. W. Johnson, Judge.

Mr. EDWIN N. BURDICK, Mr. JOHN DEWESSE, Mr. NATHANIEL HALPERN, Mr. JOHN MCPHAIL, for plaintiffs in error.

Messrs. TOLLES & COBBEY, for defendants in error.

Mr. Justice Burke delivered the opinion of the court.

HERMAN AND JENNIE ZALINSKY are husband and wife and William Zall is their son. In 1907, defendant in error, Stoddard, obtained a judgment, in the County Court, against Herman Zalinsky. In 1917, execution was issued on this judgment and returned unsatisfied, and such further proceedings had that the other plaintiffs in error were brought into this action as parties, under the contention that certain stock of the company, standing in the name of the wife and son, was in fact the property of the husband. Herman Zalinsky meanwhile, on his voluntary petition, was declared a bankrupt, the Stoddard judgment being scheduled as his sole debt. Defendant in error, McLean, was appointed trustee. On the trial a verdict was directed for plaintiffs in error. An appeal was taken to the District Court and the trial there resulted in a verdict for defendants in error. Thereupon judgment was entered decreeing 9,997 shares of said stock, standing in the name of Jennie Zalinsky and William Zall, to be the property of Herman Zalinsky, and subjecting the same to

the lien of the Stoddard judgment. Such further proceedings were thereafter had that the cause is now before us for review on error.

Among the numerous questions argued in the briefs of counsel are: The regularity of the proceedings by which Jennie Zalinsky, William Zall and The Zall Jewelry Company, were brought into the cause, and those by which McLean appeared as a plaintiff in the County Court and an intervenor in the District Court: The amendment of an appeal bond: The correctness of the instructions: And the sufficiency of the evidence. Further details concerning these matters are however unnecessary by reason of the condition of this record as hereinafter set forth.

Burke, J., after stating the case as above.

The bill of exceptions contains 450 pages and is not indexed, and the number of folios, including numerous exhibits thereto attached, is 1210. It is apparent that as originally prepared and certified, no instructions were contained therein, and none are mentioned in the certificate. Thereafter duplicate folios 1055 to 1114, and 28 additional pages, without folio numbers, all relating to instructions, were inserted just preceding the certificate. No discoverable order is followed in making up the record proper.

The original abstract of record, so-called, contains 72 pages. It is in no proper sense of the term such an abstract, but rather a collection of desultory comments on the proceedings in the District Court, such as, "Counsel were then permitted to inquire as to the age of the boy, and inquiries along that line to some considerable extent." The folios of this document are so badly mixed as to be worse than useless. The same may be said of its purported index.

The assignment contains 22 paragraphs calling our attention to that number of alleged errors of the trial court. Numbers 1, 2, 3, 19 and 20 are incomprehensible. Number 3, which is a fair example of these, reads: "The court erred in overruling the motion to quash the summons issued to make any person a party to a summons in garnishment that had already been served and answered." Each of the

remaining assignments refers to certain folios of the abstract, examination of which is indispensable to an understanding of them. In each case either the abstract is too meager to inform us of the cause of complaint, or is altogether silent upon the subject mentioned in the assignment, or fails to disclose any objection to the ruling or any exception saved thereto.

The sufficiency of the evidence to support the verdict is not covered by any assignment of error, hence a supplemental abstract of 147 pages filed by defendants in error was entirely unnecessary. "Plaintiff in error shall * * * file with the clerk * * * an abstract of the record. Such abstract shall contain a brief statement of the contents of the pleadings, the judgment, the assignments of error relied on, and such other parts of the record as may be essential; * * * The abstract shall be indexed and the folio numbers of the record shown on the margin thereof." Rule 34 of the Rules of this Court. "Plaintiff in error shall assign errors in writing at the time of filing the record and each error shall be separately alleged and particularly specified." Rule 30 of the Rules of this Court. "If the plaintiff in error shall fail to assign error, the writ of error shall be dismissed." Rule 31 of the Rules of this Court. "An exception in the lower court to an instruction is essential to a consideration of alleged error therein; such exception should appear in the abstract." *Auckland et al v. Lawrence*, 19 Colo. App. 291, 292, 74 Pac. 794.

An assignment of error based upon a document not appearing in the abstract will not be considered. *Merriner v. Jeppson et al*, 19 Colo. App. 218, 220; 74 Pac. 341. "Plaintiff in error shall prepare and file a printed abstract of the record which must set forth fully the points relied upon for the reversal of the judgment, and if in this respect the abstract is defective, the * * * writ of error may be dismissed." *Brennan Merc. Co. et al. v. Vickers et al*, 31 Colo. 324, 325, 73 Pac. 45. "If counsel desire to question the sufficiency of any pleading such

pleading should be in the abstract and other portions of the pleadings sufficient to understand the question urged." *Gerspach v. Barhyte*, 17 Colo. App. 490, 68 Pac. 1057. "Parties who desire to urge error on the refusal to admit documents must put them in the abstract * * * References to the transcript of record are not in compliance with the rules." *Mich. F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409, 417; 46 Pac. 687.

Where the portion of a pleading said to be defective is not set out in the abstract and error is not assigned to the ruling of the court thereon, the point will not be considered. *Michael v. Mills*, 32 Colo. 439, 441, 45 Pac. 429. "We are unable to gain any understanding of this case from the abstract of record. * * * For aught we know the ruling complained of was grievous error, but the abstract contains nothing to indicate that it was not entirely proper. * * * It is apparent upon the face of the abstract that it contains fragments, only, of the instructions. * * * The abstract does not show that they were met by any objection, and if they were acquiesced in their contents are unimportant. This abstract fails wholly of the purpose for which an abstract is required." (Judgment affirmed). *Kelly v. Doyle*, 12 Colo. App. 38, 39, 54 Pac. 394.

Objections and exceptions to the admission or exclusion of testimony must appear in the abstract. A statement thereof in the assignment of errors and reference to the bill of exceptions are insufficient. *McPhee & McGinnity v. Fowler*, 36 Colo. 202, 206; 85 Pac. 421. "The abstract is nothing more than an index to the transcript * * * It is so fatally defective that it cannot properly be called an abstract * * * The abstract in this case is so radically deficient that this court, consistent with good practice, must enforce the rule and make the only order appropriate in the premises, dismissal of the writ of error, which is accordingly done." *Purdy v. Geary*, 45 Colo. 129, 100 Pac. 426. "Where the court is unable to determine from an inspection of the abstract whether any error was

committed by the trial court, the practice does not require it to look elsewhere for the information." *Denver M. Co. v. M. Pub. Co.*, 4 Colo. App. 146, 35 Pac. 192.

The same rule applies where the abstract does not disclose an objection made and exception saved to the alleged erroneous ruling. "We are not obliged to search through the record to find that which it is clearly the duty of counsel to point out and print in his abstract." *Thompson v. D. D. & R. Co.*, 25 Colo. 243, 248, 53 Pac. 507.

When it is impossible to obtain from the abstract of record a comprehensive idea of the case the court may decline to consider it. *McFaddin v. Bice*, 58 Colo. 173, 146 Pac. 244. "As neither the instructions given nor those refused appear in the abstract, they will not be considered." *Knowlton v. Knight-Campbell Co.*, 59 Colo. 51, 147 Pac. 330. "Numerous errors are assigned, most of which can not be considered because the abstract shows no objection made to the rulings on which the assignments are based." *Colo. G. D. Co. v. Stearns-Rogers Co.*, 60 Colo. 412, 413, 153 Pac. 765.

It will thus be observed that as to each of the alleged errors of the trial court, discussed in the briefs of counsel, either the bill of exceptions, the abstract of record, or the assignment of errors is so defective as to preclude the consideration thereof by this court. This conclusion we announce with less reluctance because our examination of the bill of exceptions convinces us that substantial justice was done by the judgment below. The writ is accordingly dismissed and the judgment affirmed.

Garrigues, C. J., and Scott, J., concur.

Decided May 3, A. D. 1920.

Rehearing denied June 7, A. D. 1920.

No. 9620.

MCPHAIL v. SEERIE BROTHERS CONSTRUCTION COMPANY.

Plaintiff having ridden into an excavation made by another than defendant has no action against defendant. The contention that a fence erected by defendant around a building in course of construction had produced or contributed to plaintiff's injury was rejected upon the ground that the fence was lawfully constructed and was maintained only for a reasonable time.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. DUNCAN MCPHAIL, *Pro Se.*

Messrs. BARTELS & BLOOD, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action for damages for personal injuries. A judgment on the pleadings was rendered in favor of The Seerie Brothers Construction Company, one of the defendants. To review such judgment, plaintiff brings error.

In our opinion the facts admitted in the pleadings are sufficient to warrant the judgment of the trial court. The above named defendant, at the time of the injuries complained of, was engaged in the construction of a building on 17th and Champa Streets, in the City of Denver, and in compliance with an ordinance, erected and maintained a tight board fence upon such streets, along the building under construction. No facts are alleged in the complaint showing that the fence was maintained for an unreasonable length of time, or that it was not properly situated, but the contrary appears from the admitted facts. It appears to be conceded that the defendant, under the circumstances, had the right to construct and maintain the fence. The plaintiff was injured while riding a bicycle on 17th Street and falling into an excavation located near the place where the street was partially obstructed by the fence. The excavation had been made by The Western Union Telegraph Company. We fail to find any material issues

framed by the pleadings which, if found for the plaintiff, would render the Construction Company liable.

The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9656.

CLARKE v. COMMERCE STATE AND SAVINGS BANK ET AL.

BILL OF SALE—*Intended to operate as a will.* Plaintiff was demanding certain articles of jewelry and other properties, formerly the property of a Mrs. Bristow, and upon deposit in the bank. She was opposed by the administrator of Mrs. Bristow's estate. It appeared that this lady, being in difference with her husband, consulted an attorney as to a will which she had executed in favor of plaintiff, and was advised that she could not lawfully devise away from her husband more than one-half of her property. Shortly thereafter Mrs. Bristow executed a bill of sale conveying to plaintiff all her personal effects, and the same day plaintiff executed a like bill of sale to Mrs. Bristow. The safety deposit box in which all the properties in question were deposited was rented in the name of the two ladies. From these and other circumstances *held* that the court below was correct in its conclusion that the purpose of the two ladies was to vest in the survivor of them the properties of the other, and in effect created neither a sale nor a gift.

Error to the Denver District Court, Hon Julian H. Moore, Judge.

Mr. F. T. JOHNSON, Mr. S. H. JOHNSON, Mr. JOHN H. LEIPER, for plaintiff in error.

Messrs. HINDRY, FRIEDMAN & BREWSTER, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action in replevin, in which the plaintiff below, Frances J. Clarke, seeks to recover possession of certain

chattels, including articles of jewelry, bonds, and certificates of stock, which, it is alleged in the complaint, are contained in a box in the safety vault of the defendant, The Commerce State and Savings Bank. One Frank Bristow, as administrator of the estate of Elna F. Bristow, deceased, intervened in the action, and claimed the right to the possession of certain of the chattels in question as having been the property of Elna F. Bristow during her life time and as being now the property of her estate.

Upon trial to the court, all the issues were found against the plaintiff, and, upon a motion for a new trial being overruled, judgment was rendered accordingly, and plaintiff brings the cause here for review.

As between the plaintiff and the defendant bank, the controversy relates to the possession of two railroad bonds. These bonds had been put up by the plaintiff as collateral security for a loan obtained by her from the defendant bank in the sum of \$900, and, as stated in the brief of the plaintiff in error, "the bank claims the right to hold the bonds until the debt of Miss Clark (the plaintiff) is paid." In respect to this branch of the case, we find no error in the record.

As between the plaintiff and the intervenor, the dispute concerns the ownership of the property sought to be replevied. The trial court found that plaintiff did not prove her title to the property. The only question necessary to be determined, upon this review, in this connection, is whether or not the evidence is sufficient to support such finding.

The plaintiff's answer to the petition of the intervenor admits that the property in controversy "was formerly owned by Elna F. Bristow." The plaintiff relies upon a bill of sale which was executed by Mrs. Bristow on August 9, 1918, conveying to plaintiff "all right, title and interest" of Mrs. Bristow "in and to any property owned" by her "wheresoever located." This bill of sale was acknowledged before the witness, Harry S. Bowman, an attorney and a notary public residing at Santa Fe, New Mexico. This

witness testified that on the same day there was executed by the plaintiff to Mrs. Bristow a bill of sale. Prior to this time, and on March 27, 1918, Elna F. Bristow executed a bill of sale, conveying to the plaintiff the bonds and certificates of stock involved in this action, and also all her "personal effects, such as jewelry, wherever located or found." On the same day, the plaintiff executed a bill of sale conveying, among other things, "money and credits," interests in mining claims, and all her personal effects, to Elna F. Bristow. In each of these last mentioned two bills of sale, it was recited that the conveyance was made "for and in consideration of love and affection and services rendered and moneys paid." The bill of sale executed by Mrs. Bristow on March 27, 1918, was made out by her shortly after she had consulted her attorney with reference to a will in favor of the plaintiff, and had been informed by him that she could not legally will away more than one-half of her property from her husband. At that time, and subsequently, there was more or less coolness between her husband and herself. At the time she consulted her attorney, it appears that she had in mind a *testamentary* disposition of her property. The trial court based its finding on the theory that the evidence warrants the conclusion that the bill or bills of sale, relied on by plaintiff, was or were made without consideration, and that the purpose of the bills of sale executed by Mrs. Bristow, and those executed by the plaintiff, was to vest the title to whatever property one had, upon her death, in the survivor. The foregoing conclusion was based, not merely upon the facts hereinabove recited, but upon the whole evidence, including the contents of the safety deposit box. At the time of the trial, the box contained papers and articles included in the list of chattels named in the bill of sale executed by the plaintiff, and also bonds, certificates and jewelry named in the bill of sale executed by Mrs. Bristow. The box had been leased from the defendant bank, on March 27, 1918, jointly by the plaintiff and Elna F. Bristow, and the evidence warrants the inference that each retained a key to the box. The stock

certificates in the name of the plaintiff, which were in the safety deposit box at the time it was produced at the trial, had all been endorsed in blank by the plaintiff. The box also contained a check payable to the order of the plaintiff and signed by Mrs. Bristow. The date in the check had been left blank; the amount payable was not specified. This is another circumstance tending to show that the plaintiff and Mrs. Bristow intended their respective bills of sale to operate as wills, and not as evidencing sales or gifts *inter vivos*.

It is not shown that the trial court misconceived the law applicable to the evidence. There is sufficient evidence in the record to support the trial court's finding that the bills of sale executed by Mrs. Bristow created neither a sale nor a gift, and, therefore, that plaintiff did not prove her title to the property.

The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9664.

DUNKLE ET AL. v. HAIGHT.

1. JUDGMENT—*Collateral attack*. Action against the principal and sureties in a redelivery bond given in an action of replevin. Judgment for plaintiff. One of the sureties having paid the judgment brought his action against the principal and the other sureties, demanding of the principal the full amount of payment, and of the sureties contribution. *Held* that the defendants were not permitted to question the judgment in replevin.
2. SURETIES—*Contribution*. Judgment was recovered on a redelivery bond against one of the sureties therein. Having paid the judgment he was entitled to contribution from his co-sureties, though they were not served with process nor made appearance in action on the bond.

3. REDELIVERY BOND—*Assignment by sheriff*, is not required in order to bring action thereon by one otherwise entitled to such action.

And the judgment thereon is conclusive evidence of the assignment, if necessary.

4. LIMITATIONS—*Surety how affected*. As to a surety seeking contribution, from his co-sureties the statute of limitations does not begin to run, until discharge of his liability as surety by payment.

Error to Douglas County Court, Hon. John Anderson, Judge.

Mr. GEORGE V. DUNKLEE, and Mr. EDWARD V. DUNKLEE, for plaintiffs in error.

Mr. HORATIO S. RAMSEY, Mr. J. ERNEST MITCHELL, Mr. PAUL M. CLARK, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE complaint by R. D. Haight, defendant in error, alleges that S. W. French, on November 28, 1903, instituted an action in replevin against John L. Dunkle, plaintiff in error, to recover certain horses; that the said defendant gave a forthcoming bond and retained possession of the horses, with W. C. Kelly and R. D. Haight as sureties; that French obtained judgment against Dunkle in the County Court, and upon appeal, he obtained judgment in the District Court, on the 25th day of March, 1908, in the sum of \$420.61 with costs, which judgment was affirmed by this court. *Dunkle v. French*, 51 Colo. 170, 116 Pac. 1039.

Afterwards the said judgment was assigned by French to Clark Blickensderfer, who, on the 24th day of July, 1912, instituted suit against Dunkle, Kelly and Haight to recover on the redelivery bond, and obtained judgment thereon April 3rd, 1913, in the sum of \$685.00 and costs. Execution was issued thereon and levy made upon the property of Haight, the plaintiff in this suit. Haight then paid the judgment, in the sum of \$704.70 on the 23rd day of September, 1913, and he now brings this suit for the recovery of the full sum paid on the judgment from Dunkle and for

contribution on the part of Kelly. Judgment was rendered accordingly, from which the defendant Dunkle brings error.

The contentions of the defendants are: 1. That they were not served with summons in the case of Blickensderfer against them, and made no appearance therein, and therefore the court was without jurisdiction, and for such reason the judgment was void as to them. 2. That as Haight has paid the judgment, it has been fully satisfied. 3. That the sheriff, Charles Gallagher, to whom the re-delivery bond ran, has made no assignment thereof to the plaintiff or any other person, and for such reason the plaintiff has no right to maintain an action thereon. 4. That more than six years had elapsed since the defendants executed the bond, and the action is therefore barred by the statute of limitations. 5. That the judgment in replevin was not made in the alternative and for such reason recovery could not have been properly entered on the bond.

The plaintiff was not a party to the action in replevin. If the form of the judgment was irregular, the place to correct it was in the Supreme Court when it was reviewed. It is now *res judicata*. It cannot be attacked in this independent proceeding. *McCarthy v. Strait*, 7 Colo. App. 59, 42 Pac. 180.

It is immaterial, in so far as it affects this suit whether or not the defendants were served or appeared in the suit on the replevin bond. The judgment was valid as against Haight and he was compelled to and did pay it. He is therefore entitled to recover from the principal and to contribution from his co-surety.

It was not necessary that the sheriff, the mere nominal obligor in the bond, should assign it. The plaintiff was the real party in interest and may bring suit in his own name to enforce it. The sheriff could have no possible interest in it, and it was for the exclusive benefit of the plaintiff. But in this case, even if an assignment was necessary, the judgment is a conclusive presumption that this requirement was met. There is no evidence to the contrary.

As to the statute of limitations, it is universally held that so long as a guarantor is legally liable upon his guaranty, he may pay the claim and seek contribution from his co-guarantors, and that the statute does not commence to run as to him until he has paid the claim, for, until such payment, he has no right to exact contribution.

Counsel cite no authority to support their contention.

The judgment is affirmed.

Garrigues, C. J., and Burke, J., concur.

No. 9668.

BALCOM v. MICHAEL.

CONTRACT—Construed. Contract for the planting and cultivation of beans by plaintiff, and the subsequent delivery of the product to defendant. Below the signature to the writing evidencing this agreement was a memorandum in writing in these words, "Guarantee prices as much as any other house." Plaintiff having delivered the beans raised by him and been paid therefor the price specified in the contract, sued for an additional per cent on the ground that another house had paid for beans a price in excess of that paid for plaintiff, and that the clause quoted entitled him to such excess. *Held* that the memorandum relied upon by plaintiff was expressly excluded from the contract by the final provision thereof that "there are no agreements or understandings other than those expressed above."

Error to Weld District Court, Hon. George H. Bradfield, Judge.

Mr. WILLIAM R. KELLY, Mr. WORTH ALLEN, for plaintiff in error.

Mr. JAMES W. GAULT, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error had judgment in an action against plaintiff in error, to recover an alleged balance for seed beans sold and delivered to the latter. That judgment is

now before us on error. The parties will be designated as in the trial court. It appears that the defendant, a dealer in seeds, made a contract with the plaintiff, a farmer, to raise for and deliver to defendant, a quantity of seed beans. The controversy turns upon the construction of that contract. One Williams, an agent of the defendant, called upon plaintiff, and presented to him a printed proposition, directed to defendant, specifying the manner in which the seeds were to be planted, cultivated, threshed and cleaned, all in detail, but with blanks for the insertion of the acreage and price to be paid, on delivery of the seeds, at Greeley. The final paragraph of the proposition was as follows: "There are no agreements or understandings regarding the subject-matter of this letter other than expressed above." The letter was signed by plaintiff, and below his signature is the acceptance of the defendant, "By Colie Williams." Below that is the following: "Guarantee prices as much as any other house." Plaintiff was paid at the rate stated in the proposition, and then sued for an additional two cents per pound.

On the trial to the court, it was shown that another seed house paid \$10.00 per hundred pounds for the same kind of beans, and the court gave judgment for the amount claimed, together with some small items not contested. No findings of fact or of law were made.

It is clearly shown that the agent, Williams, was not authorized to contract for beans at a price greater than \$8.00 per hundred. Plaintiff's theory is that defendant ratified the act of his agent in writing the memorandum on the letter, by not repudiating it. Defendant introduced testimony showing repudiation, but, there being a conflict of evidence on that point, we are bound by the court's finding on it which, in support of the judgment, we must presume he made in favor of the plaintiff. The case must, therefore, be determined on a consideration of other features of the case.

The presenting of the letter to plaintiff for signature constituted, in effect, an offer by defendant to contract for

the raising of beans on the terms therein stated. When it was signed by plaintiff and delivered to defendant's agent, and accepted by him, it became a bilateral contract, made by parties having full authority to make it in that form. The memorandum below the signatures was, by the final paragraph of the letter, expressly excluded from the contract. To treat it otherwise is to contradict plaintiff's written statement.

The memorandum amounts to an independent proposition by plaintiff to defendant to modify the contract into which the parties had entered. It was for the plaintiff to show that his proposition was accepted by defendant, as it is clear that the agent had no authority in the premises. Unless defendant consented to it either by word, or by some act which plaintiff was justified in considering an acceptance of his proposition, the original contract controls.

Counsel urges that the silence of defendant must be treated as a ratification of the act of his agent in writing the memorandum on the letter. If, however, the writing was a proposition from the plaintiff, silence on the part of defendant cannot be held to make the memorandum a part of the contract. A principal ratifies the unauthorized act of his agent; but the memorandum was an offer by the plaintiff, and the agent of defendant acted only as plaintiff's amanuensis in writing it on the document. The agent testified that he told plaintiff that defendant's acceptance of it was necessary if it was to have any force. This is not denied, but is corroborated by one of plaintiff's witnesses, his son-in-law, who testified that Williams said he would make the memorandum, "so if Mr. Michael got it through he would get the benefit of it."

On the evidence, as it appears in writing, and on testimony which is not disputed, we are of the opinion that there was nothing in defendant's action which amounts to an acceptance of the memorandum proposition by plaintiff. It must, therefore, be held that plaintiff had no right to recover for the two cents per pound claimed.

The judgment is accordingly reversed with directions to modify the judgment in accordance with the views herein expressed.

Decision *en banc*.

Garrigues, C. J., dissents.

No. 9708.

FEIT v. REICHERT.

1. PRACTICE IN ERROR—*Findings supported by competent testimony, will not be disturbed.*
2. REFORMATION OR RESCISSION—*Election.* Where facts justify either reformation or rescission party must elect and abide such election.

Error to Larimer District Court, Hon. Neil F. Graham, Judge.

Mr. L. D. THOMASON, for plaintiff in error.

Mr. L. R. TEMPLE, for defendants in error.

Mr. Justice Burke delivered the opinion of the court.

PLAINTIFF in error, who was plaintiff below, executed a deed of trust conveying certain property to defendants in error, A. L. Rohling, Henry Reichert and David Ruff, as trustees. One half of said property was, by the terms of the deed, to be held in trust for plaintiff, the other for her children. This action is brought to rescind that instrument on the ground of fraud. Plaintiff speaks the German language and is unfamiliar with the English. She alleges in her complaint that two of the trustees, who assumed to translate this deed for her before she signed it, deliberately deceived her as to its terms. The complaint sets up a good cause of action for *rescission* and prays that relief. Trial was had to the court, without a jury, and to review the judgment entered against her plaintiff brings error.

In his assignment and brief counsel for plaintiff complains of the refusal of the trial court to *reform* the trust deed in question, and such is the relief sought here. "The circumstances may be such as to give one of the parties an election either to have the contract reformed or to have it rescinded. Here he must make a definite choice of his remedy. * * * and he must abide an election once made." Black on Rescission and Cancellation, Vol. 1, Sec. 11, p. 16.

Plaintiff testified that neither Rohling nor any one else translated the trust deed for her at the time she signed it. Rohling testified that both he and Henry Reichert then and there fully and fairly translated for her that instrument. There is considerable additional evidence in support of each. Under such circumstances the findings of the trial court will not be disturbed. "If there is anything that is well settled in this state, it is that this court will not set aside the findings of fact of the trial court if they are supported by competent testimony." *Vigil v. Garcia*, 36 Colo. 430, 437; 87 Pac. 543.

The judgment is accordingly affirmed.

Garrigues, C. J., and Teller, J., concur.

No. 9793.

RICHARDSON v. CORNELL.

PLEADING—*Cause of Action not Sufficiently Pleaded.*

The only cause of action suggested by the complaint not being sufficiently stated, the demurrer was properly sustained.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Mr. PERRY D. ROSE, for plaintiff in error.

Mr. JAMES C. STARKWEATHER, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE complaint in this case alleged the following contract between the plaintiff, defendant, and one William J. Candlish:

"January seventh, 1918.

"In consideration of J. E. Richardson lending certain bonds of the English Government to be used as collateral security in securing the money necessary to take up the option held by H. W. Cornell on 35,000 shares of the Shiloh Oil and Refining Company at \$.12 per share, the undersigned have agreed as follows: "1. Said Shiloh stock, together with 10,000 shares of the Red Bank Oil Company and 100,000 shares of the Colorado Oil and Development Company shall stand as collateral security in said transaction, and for the protection of J. E. Richardson against any loss whatever. 2. It is contemplated that this transaction shall be consummated by the resale of all or part of said Shiloh stock within ten days from this date; that in any event sufficient of such stock shall be sold to repay such loan and restore said bonds and collateral stock to the parties depositing them; that the concurring judgment of two of the undersigned, shall determine the time and price at which said Shiloh stock shall be sold to repay such loan, all the proceeds of such sales to be applied to such loan until the same is fully paid. 3. All the profits of said transaction, including stock remaining after repayment of said loan, are to be divided by the undersigned, share and share alike, that is to say, one third to each.

"In witness whereof the undersigned have affixed their signatures this 7th day of January, 1918.

WILLIAM J. CANDLISH,

J. E. RICHARDSON,

H. W. CORNELL."

It is then alleged that the defendant purchased the Shiloh shares at the price agreed and deposited the same with the plaintiff, together with the 10,000 shares of the Red

Bank stock and 90,000 shares of the Colorado Oil and Development Company in the manner agreed, and that the plaintiff delivered certain English bonds to defendant which were deposited with the Colorado National Bank by defendant and Candlish to secure the payment of their joint promissory note, the proceeds of which was applied to the payment of the purchase of the 35,000 shares of Shiloh stock as agreed.

It is further alleged that this note was afterward paid and the English bonds released from their use as collateral and returned to the plaintiff as agreed. In other words, the contract was fully performed by the defendant, except it was not performed within the time agreed. The charge in this particular is that the stocks were sold by defendant with permission of plaintiff as agreed in the contract, but that the proceeds of such sale were not promptly applied to the payment of the note to the bank, thereby causing delay in a return to plaintiff of his securities.

The prayer of the complaint is not for damages for loss, or division of profits in the transaction. It is, however, alleged that the defendant failed to pay all of the sums received from the sales of stocks from time to time as such sales were made, but that a part of these sums were reinvested by the defendant in other oil stocks and oil leases of uncertain and indefinite description in the complaint, either as to the number of shares of such stocks or of the leases, or value as to either. The sole relief prayed for is that the defendant be enjoined from the sale of any such stocks or interests in leases, and that plaintiff be subrogated to the rights and interests of defendant therein.

A demurrer was sustained to the complaint as being insufficient to state a cause of action. An amended complaint was ordered to be stricken from the files as being in substance but a repetition of the original complaint. The plaintiff brings error and presents his application for a supersedeas.

It seems to be clear from the pleading that if plaintiff has a cause of action against the defendant, it must be for

damages for delay in returning his securities, which were agreed to be and were deposited as security for defendant's note to the bank. But this is not sufficiently pleaded, nor is any such damage demanded. The contract discloses a joint speculation by the parties in which the plaintiff made no investment and took no chances, except the deposit of his bonds as collateral to secure payment of the defendant's note, and which have been returned to him. A mere statement of the facts discloses the correct conclusion of the court in the premises.

The application for a supersedeas is denied and the judgment is affirmed.

Garrigues, C. J., and Denison, J., concur.

No. 9794.

MORGAN v. HOWARD REALTY COMPANY.

1. REAL ESTATE BROKER—*When Entitled to Commission.* Where under employment of the owner he effects a sale, or is the moving cause of one effected by the owner.

So where a sale is frustrated by the employer.

2. VENDOR AND PURCHASER—*Contract Construed.* "A proper abstract of title" must be held to be an abstract showing a merchantable title. Where the employment is exclusive in terms, the owner cannot negotiate a sale on other terms than those prescribed to the broker and defeat the broker's commission.

A pending leasehold estate is included in a contract for the sale of the fee.

3. CONTRACTS—*Oral Negotiations*, preceding or accompanying the execution of an agreement in writing merge therein.

Department One.

Error to Bent District Court, Hon. A. F. Hollenbeck, Judge.

Mr. ALLEN M. LAMBRIGHT, for plaintiff in error.

Mr. H. G. BELL, Mr. ALLYN COLE, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

THE parties will hereinafter be designated as in the court below where the Realty Company was plaintiff and the plaintiff in error was defendant.

The plaintiff was a co-partnership engaged in the business of selling real estate on commission. On September 6, 1917, defendant entered into a contract with plaintiff by which it was authorized "to sell the following described premises, the same to remain exclusively in their hands for sale," with an agreement to pay five per cent commission on the price agreed upon. The contract further provided that the commission would be paid "if the sale is affected during said period" (i. e. the period for which it was listed).

* * * "proper abstract of title will be furnished the buyer by me, * * *. Encumbrance on the property \$3,000. Price \$90. Terms cash \$2,500." October 10, 1917, defendant and one Paul Albert Guder entered into a contract of sale of the premises in question by which defendant agreed "to convey to said party of the second part, in fee simple, by good and sufficient warranty deed" the property in question * * * "said premises to be free and clear of all liens, encumbrances and taxes." The purchase price mentioned in the contract was \$13,600, of which \$20 was paid down, \$5,000 to be paid on or before November 10, 1917, \$8,580 on or before six years from date. The contract recited that Guder "has given three promissory notes," for the deferred payments. This contract makes no provision for any election or forfeiture by the purchaser but it does provide that in case he fails to comply with any of its terms it "shall be forfeited and determined at the election of said party of the first part."

Plaintiff alleges that it fully complied with the terms of the listing contract and asks judgment for its commission, \$680. Defendant alleges that the sale was a conditional one, the conditions being that the \$5,000 payment should be made on November 10, 1917, and security for the balance delivered on that date, and that one Stephens, a tenant, under a lease expiring March 1, 1919, would consent

to deliver up possession of the land upon consummation of the contract; that the tenant refused to so surrender, whereupon Guder failed and refused to consummate the agreement and it was abandoned. The new matter in the answer is denied by replication. The cause was tried to a jury which returned a verdict for plaintiff for \$680. Motion for new trial having been filed and overruled judgment was entered on the verdict. From that judgment defendant brings error and the cause is now before us on his application for a supersedeas.

Burke, J., after stating the case as above.

That the purchaser Guder was plaintiff's client is established by the evidence and there is neither proof, nor offer of proof, to the contrary. That he was ready, willing and able to buy upon terms satisfactory to the owner is established by the fact that they entered into a contract of sale which could only be avoided by the default or consent of defendant himself.

Two defenses only are urged against this claim for commission which require our consideration. The first is that the contract made by plaintiff with the purchaser was not the contract which he was authorized to make; the second that the contract of sale was conditional and that the conditions were never met. "When property is put into the hands of a real estate agent for sale and he directly negotiates one, or is the moving cause by which one is effected, either by himself or the owner, the authorities agree that he is entitled to his commission." *Leonard v. Roberts*, 20 Colo. 88, 91; 36 Pac. 880.

The same is true "although no sale was in fact concluded, if the failure to effect one was the fault of the principal." *Perkins v. Russell*, 56 Colo. 120, 126; 137 Pac. 907. It will not defeat the claim for commission that the owner himself closed a contract with the broker's client upon terms slightly differing from those quoted the broker or that he failed to contract, or to enforce his rights under a contract in fact executed, where the parties are brought together and the trade effected. by the agency of the broker. *Finnerty*

et al v. Fritz, 5 Colo. 174, 179. *Howe v. Werner*, 7 Colo. App. 530; 44 Pac. 511. "It is sufficient if the party desiring to trade his property for another solicits the services of a broker who finds a person willing and able to make the exchange and brings the parties together who thereupon enter into negotiations which they ultimately conclude though on terms somewhat varying from those expressed in the original proposition. The broker thereby earns his compensation." *Knowles v. Harvey*, 10 Colo. App. 9, 11, 52 Pac. 46.

Defendant's contention that the execution and delivery of the contract of sale was conditional cannot in the face of this record be maintained. If there was in fact outstanding a leasehold interest in the property in question, that leasehold interest was included in the listing contract; first because it was not excluded, and second because defendant thereby agreed to furnish a "proper abstract of title," which must be held to be an abstract showing a marketable title. Such leasehold interest was also included in the Guder contract of sale. The title to be conveyed thereunder being one "in fee simple, by good and sufficient warranty deed * * * free and clear from all liens, incumbrances and taxes." Defendant sought to show that prior to the execution and delivery of this contract of sale it was orally understood and agreed that such a title should be transferred by defendant only in the event he could procure the leasehold interest. "All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it." *Randolph et al v. Helps et al*, 9 Colo. 29, 33; 10 Pac. 245.

If such an oral agreement was in fact made it was contrary to the written agreement and the offer of evidence to support it was properly excluded. "The language of a contract is the agreed repository of the intention of the parties, and from it, when free from ambiguity, they cannot be allowed to appeal to the less certain testimony of witnesses." *Randolph v. Helps, supra*.

In addition to the foregoing it might be observed that under the listing contract the presumption was that the seller

would deliver possession. That contract was exclusive and, without terminating it as therein provided, the owner could not negotiate a sale on other terms and defeat the broker of his commission. Under the terms of the contract of sale defendant could have enforced it by an action for specific performance. He could not therefore by his election to forfeit the contract avoid payment of the commission.

For the reasons above stated the supersedeas is denied and the judgment affirmed.

Garrigues, C. J., and Teller, J., concur.

No. 9798.

SCHROEDER ET AL v. SNARR.

1. CORPORATIONS—*Failure to file annual report—Complaint of creditor, failing to show whether no report was filed, or whether that filed did not with sufficient detail set out the particulars required by the statute, is insufficient in law.*
2. FALSE REPORT—*In due form, is sufficient to protect the directors from liability under c. 102 of the Acts of 1911.*

The directors responsible for a false report are liable under Rev. Stat. sec. 876.

Error to Ouray County Court, Hon. E. G. MacAdams, Judge.

Application for supersedeas.

Mr. CARL J. SIGFRID, for plaintiffs in error.

Mr. E. E. WHEELER, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE defendant in error brought suit against the plaintiffs in error, as directors of a corporation, to recover from them a debt of the corporation, the ground of their alleged liability being the failure of the corporation to file an annual report. A general demurrer to the complaint was overruled. The defendants answered and the cause was tried to the court.

Judgment was entered for the plaintiff and the defendants bring error. Paragraph 2 of the Complaint reads as follows: "That said, The Calliope Consolidated Mining Company did fail, refuse and omit, within the sixty (60) day period following the first day of January, of the year A. D. 1919, to file in the office of the Secretary of State, an annual report showing the amount of the indebtedness of said corporation, at the date of filing said report, and such other information as would show, with reasonable fullness and certainty, the financial condition of such corporation, within said period, as is required by Chapter 52, of the 1901 Session Laws of Colorado, together with the amendments thereto, contained in Chapter 102 of the 1911 Sessions Laws of Colorado."

The demurrer alleged that the complaint did not state facts sufficient to constitute a cause of action, specifying, among other things, as grounds for the objection: "That it fails utterly to show in what respect and to what extent and why the report of the said, The Calliope Consolidated Mining Company, was insufficient to give with reasonable fullness and certainty the financial condition of the company."

The court erred in overruling the demurrer. It does not appear from the complaint whether the default of the company was in filing no report at all, or in filing a report which did not, with sufficient detail, set out the various matters required to be stated, or whether it contained statements that were false.

Such a complaint does not enable anyone to determine the ground of the pleader's objection to the report. If he was wrong in his construction of the language of the report, he had no cause of action. The plaintiff introduced evidence to show that the corporation's indebtedness was greater than reported, the issue tried being apparently the truth of the report as to the indebtedness. A motion for a nonsuit was overruled, and that action and the overruling of the demurrer are assigned as error.

In *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812, this court held, in a case like the instant case, except that it was

brought under an earlier statute, that a report, though false, if in proper form, is sufficient to protect the directors from liability for the debts of the company under the statute. It is there pointed out that if a false report was made, the persons responsible for it were liable under another statute, which statute is still in force, i. e., Section 1010 Mills Annotated Statutes, 1912.

The court said that statutory liability can arise only in case of a failure to file a report in compliance with the provisions of the statutes, and added: "If that be done, than the trustees are not liable, even though the report be totally and wholly false; and the party must seek his remedy therefor under the section which provides a penalty in such case, and pursue the officers who are knowingly guilty of the misrepresentation for which the statute has provided a penalty. This doctrine is well supported by the New York cases, and is a reasonable and safe construction." Accepting the law thus laid down, it appears, not only that the court erred in overruling the demurrer, but in not granting a nonsuit.

The judgment is accordingly reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9811.

THE PEOPLE EX REL. v. THE COUNTY COURT OF DENVER.

1. WANT OF JURISDICTION, *as a Defense, when it depends on a question of fact, must be pleaded affirmatively.*
2. FORMER JUDGMENT—*As a Defense—Must always be pleaded.* Petition for prohibition to restrain the County Court from entertaining the petition of a divorced wife for custody of the children. The contention of the respondent husband was, that in *habeas corpus* proceedings in the District Court, the children had upon the same facts been awarded to him. But no answer pleading the judgment of the District Court had been filed. The petition was dismissed.

*Petition for Writ of Prohibition.**Department Two.*

Mr. H. R. KAUS, for petitioner.

Mr. WAYNE A. GUNKLE, for respondents.

Mr. Justice Denison delivered the opinion of the court.

JESSIE E. HILL on the 16th of February, 1920, brought suit for divorce against Richard T. Hill in the Denver County Court. Among other things she prayed for the custody of their two minor children, pending the action.

This proceeding is brought to prohibit the consideration of the custody of the children by that court, on the ground that heretofore, in a habeas corpus proceeding in the District Court, upon the same facts now alleged by the wife, the custody of the children has been awarded to the father until the further order of that court; and it is claimed that, therefore, the County Court has no jurisdiction over the custody of the children, and that their custody and the facts upon which their custody is claimed are *res adjudicatae*.

No answer is shown to have been filed below pleading *res adjudicata* or want of jurisdiction; indeed no answer has been filed at all. *Res adjudicata* is a defense that must always be pleaded affirmatively, and wherever want of jurisdiction depends upon a question of fact and does not appear on the face of the complaint, an affirmative plea is necessary to raise that issue. The cases on this point are numerous. The following are some of them: *Ex parte Little Rock*, 26 Ark. 52, 38 Am. Dec. 46; *Whipple's Succession*, 2 La. Ann. 236; *People v. Putnam County Surr.*, 36 Hun. 218; *State v. Breckenridge*, 43 Okla. 711, 142 Pac. 407, 142 Pac. 407; *State v. Voorhies*, 34 La. Ann. 1142; *See also Callbreath v. Dist. Ct.*, 30 Colo. 486, 71 Pac. 387; *Adams Co. Ct. v. People*, 43 Colo. 539, 111 Pac. 86; *Miller v. Weston*, 67 Colo. 534, 189 Pac. 610.

The petitioner alleges that he "directed the County Court's attention" to the proceedings in the District Court;

but he should have framed an issue there in the proper way. *Adams Co. Ct. v. People, supra.*

If the County Court had no jurisdiction of the subject matter of divorce or custody of children a different question would be presented.

The writ of prohibition should be denied.

Garrigues, C. J., and Scott, J., concur.

No. 9229.

GUYER v. STUTT.

1. CONSTITUTIONAL LAW—*The Recall of Officers—School Director.* Section 1 of Article 21 of the Constitution (Laws 1913, p. 672) applies only to elected public officers of the state. City, county and town officers may be recalled under section 4 of the Act.
2. SCHOOL DIRECTORS—*Duties*, are performed in and relate exclusively to their own districts, respectively. That they act under the laws of the state does not constitute them officers of the state.
3. STATUTES—*Construction.* A particular power given in clear and definite words should have effect, as against general and confusing expressions, especially, when to adopt the other interpretation would render the clear and definite provision mere surplusage.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. WARWICK M. DOWNING, Mr. DOUGLAS A. ROLLER, Mr. JOHN D. MILLIKEN, for petitioner in error.

Messrs. CRANSTON, PITKIN AND MOORE, for respondent in error.

Mr. Chief Justice Garrigues delivered the opinion of the court.

UPON petition in certiorari brought by Clarkson N. Guyer to review the proceedings of W. A. E. Stutt, as secretary of School District No. 1, City and County of

Denver, the District Court held that a school director is subject to recall. May 5, 1917, there was filed with Stutt, as secretary of the board, a petition for the recall of Guyer, a duly elected and qualified member of the school board. A writ of certiorari was issued to Stutt requiring him to certify all his proceedings under the recall to the District Court, which was done, and, after argument thereon, the District Court quashed the writ, and affirmed the recall proceeding, and the only question involved in the case here is whether Art. 21 of the Constitution, entitled, "Recall from Office" (S. L. 1913, p. 672), applies to school directors.

Garrigues, C. J., after stating the case as above.

Sec. 1 of the recall amendment expressly provides for the recall of "every elective public officer of the state of Colorado," and also expressly provides the procedure to be followed in exercising such power under this section. Sec. 4 provides that the recall may also be exercised with reference to the elective officers of each county, city and town, but, until otherwise provided by law, leaves the manner of exercising the recall power, as to these officers, to be provided by the legislative body of the county, city and town, showing that, for the purpose of the recall, in the sense contained in the amendment, the elective officers of counties, cities and towns are not regarded as public officers of the state, but as city, county and town officers. Of course it follows that the recall power mentioned in Sec. 4 cannot apply to county, city and town officers until the manner of exercising it shall be provided according to law. Nowhere in the instrument is it said that school directors may be recalled.

Sec. 1, which says that every elective public officer of the state may be recalled by and through the procedure and in the manner therein stated, provides that a petition signed by electors equal in number to 25% of the vote cast at the last preceding election must be filed in the office in which petitions for nominations to office held by the incumbent are required to be filed, provided, if more

than one person is required to be elected to the office, then the petition shall be signed by electors entitled to vote for a successor equal in number to 25% of the entire vote cast at the *last preceding general election*. The petition being sufficient, Sec. 2 provides that the officer with whom it is filed shall forthwith submit it, together with a certificate of its sufficiency, to the Governor who shall order and fix the day for holding the election, provided, if a *general election* is to be held within 90 days after the date of submission of said petition the recall election shall be held as a part of the *general election*. Sec. 3 provides that the Governor shall publish notice for holding the election, and that the election officers shall make all arrangements for such election, and the same shall be conducted, returned, and the result thereof declared in all respects as in the case of *general elections*. Sec. 4 provides that during the term of office for which one is elected a second recall petition shall not be filed against him unless the signers to the petition shall equal 50% of the votes cast at the *last preceding general election*. This section further provides that if the Governor is to be recalled, the recall duties imposed upon him shall be performed by the Lieutenant Governor, and if the Secretary of State is sought to be recalled the duties imposed upon him shall be performed by the State Auditor. In addition to the recall of state officers provided for in Sec. 1, Sec. 4 provides that the recall may also be exercised by the electors of each county, city and town with reference to their elective officers, and, until otherwise provided by law, the legislative body of such county, city and town may provide for the manner of exercising the power but shall not require any such recall petition to be signed by electors more in number than 25% of the entire vote cast at the *last general election*. The amendment shows upon its face that it relates to the general biennial election in November and not the school elections. School elections in this state are not regarded as general elections within the meaning of our constitution and statutes, but as school elections.

Our constitution provides for one general election to be held every two years. Sec. 1, art. 4 provides for the election of state officers at the *general election* every two years, and sec. 3, art. 4 provides that the state officers shall be chosen by the qualified electors on the day of the *general election*. Sec. 15, art. 6 speaks of choosing district judges at the first *general election*, and that certain other named officials shall be elected at the time of holding the *general election*. Before the adoption of the recall amendment, the constitution expressly referred to the general election, in which school directors were not included. The recall amendment, by referring expressly to the *last preceding general election*, shows the recall applies to state officers only, except as it otherwise makes direct provision for the recall of city, county and town officers.

Having examined the constitution, let us now see what construction has been placed thereon by the legislature. Rev. Stat. Sec. 2137. State officers to be elected.

Sec. 2. At the *general election*, A. D. 1878, and every alternate year thereafter, there shall be elected the following state officers, to-wit, etc. Rev. Stat. 2138. Judge of Supreme Court, and other officers.

Sec. 3. At the *general election*, A. D. 1879, and every third year thereafter, there shall be elected, etc. Rev. Stat. 2139. County officers to be elected.

Sec. 4. At the *general election*, A. D. 1877, and every alternate year thereafter, there shall be elected in every county of the state the following county officers, etc. Rev. Stat. 2140. County commissioners, and other officers.

Sec. 5. At the *general election*, A. D. 1877, and annually thereafter, there shall be elected in each county of the state one county commissioner, etc.

The election laws (acts of 1911 and 1917 regarding registration of electors at general elections) expressly provide that they shall not apply to school elections.

The statute further provides that the regular term of office of all state, district, county and precinct officers shall

commence on the second Tuesday of January after their election, and that school directors shall be elected annually on the first Monday in May. The fact that no manner of procedure is given or provided for exercising the recall as to them is another ground for believing it was not intended as to school directors.

The term "general election" has a well defined meaning in our constitution and statutes, and a school election is not so regarded, and we cannot find where it has ever been so held by the courts. We are convinced the recall was intended to apply only to the elective public officers of the state except as provided in Sec. 4 for the recall of city, county and town officers. The words "every elective public officer of the state of Colorado" as used in Sec. 1 refer, for the purposes of the recall, to officers of the state as distinguished from members of school boards, county, city, town and precinct officers. In 36 Cyc. 852, under the topic of "Who are State Officers", it is said: "State officers are those whose duties concern the state at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereignty power of the state. They are in a general sense those whose duties and powers are coextensive with the state, or are not limited to any political subdivisions of the state, and are thus distinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality, and from county, city, town and school-district officers."

The words "elective public officers of the state" as used in this amendment mean officers whose duties and powers are coextensive with the state, as distinguished from county, city, town, district and school officers. School directors have no jurisdiction to perform duties outside of the school district where they are elected. Their duties are performed in, and relate expressly to, their own district, and are coextensive therewith. Because they act by authority of the state law does not make them state officers. *State v. Dillon*, 90 Mo. 229, 2 S. W. 417; *Travis County v.*

Jourdan, 91 Tex. 217, 42 S. W. 543; *People v. Evans*, 247 Ill. 555, 93 N. E. 388; *Lane v. McLemore* (Tex. Civ. App.) 169 S. W. 1072; *State ex rel. Stearns v. Smith*, 6 Wash. 496, 33 Pac. 974; *Ex parte Wiley*, 54 Ala. 226; *State v. Hewitt*, 3 S. D. 187, 52 N. W. 875, 16 L. R. A. 413, 44 Am. St. Rep. 788.

Sec. 4 provides, "Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provision of this constitution." It is practically impossible to understand or construe this section because of its ambiguity. The trial court said, "it contains an extraordinary jumble of confused ideas in hopeless conflict", in which we concur. It is claimed it makes all elective public officers having authority to exercise or exercising any public or governmental duty, power or function subject to recall through the procedure and in the manner provided in Sec. 1. If such was the intention, it is beyond comprehension why the drawers of the amendment did not say in Sec. 1 that every public officer exercising any public or governmental duty, power or function should be subject to recall through the procedure and in the manner therein provided, without particularly specifying any class. By classifying practically all of the elective public officers, and omitting school directors, it would seem they were intentionally omitted from the recall. The framers of the amendment must be presumed to have intended what is expressly and specifically therein stated rather than what might be inferred from the use of ambiguous generalities. It is a rule of construction that a particular power which is clear and definite should be given effect as against a confusing general expression, and especially so when to give the effect contended for would make the clear specific provisions unnecessary and surplusage. 3 Cyc. 1129; *In re Rouse, Hazard & Co.*, 91 Fed. 96, 98, 33 C. C. A. 356.

Judgment reversed and cause remanded with directions to enter the proper judgment in accordance with the views herein expressed.

Mr. Justice Scott and Mr. Justice Denison concur in the conclusion that school directors are not subject to the recall.

En banc.

No. 9420.

COUNTY OF OURAY *v.* COUNTY OF SAN JUAN.

PRACTICE IN ERROR—Judgment supported by competent evidence, will not be disturbed. The rule applies where only a part of the witnesses are examined before a referee.

Error to San Juan District Court, Hon. Jesse C. Wiley, Judge.

Mr. CARL J. SIGFRIED and Mr. WILLIAM A. REEF, for plaintiff in error.

Mr. W. A. WAY and Messrs. RUSSELL & REESE, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was begun in April, 1907, to determine the boundary line between the counties of Ouray and San Juan. The trial court found in favor of the latter county, and the cause was brought here for review. Judgment was reversed and the cause remanded for a new trial. 58 Colo. 67, 143 Pac. 841. Upon the second trial judgment was again entered for San Juan County, and the cause is once more here upon writ of error.

The boundary in dispute was fixed by the General Laws of 1877, as follows: "Commencing at a point on the boundary line between the Counties of Hinsdale and San Juan, due east of the junction of Mineral Creek and the main branch of the Uncompahgre river; thence due west

through said junction to the summit of the divide between Red Mountain Valley and Poughkeepsie Gulch."

The question of fact determined in the former action, and by this one as well, is whether the stream designated by the State Engineer is the Mineral Creek mentioned in the statute. As was stated in our former opinion, *supra*: "The contention is not as to any ambiguity in the language of the statute, but as to where the junction of Mineral Creek and the main branch of the Uncompahgre River is."

It appears that some of the evidence upon which the judgment rests was taken before a referee, and therefore it is contended that the rule that a judgment will not be disturbed on review, if there is competent evidence to support it, is not here involved because the trial judge had no opportunity to hear the witnesses, and observe their demeanor upon the witness stand. The record discloses, however, that some of the testimony was given before the trial court, and as to those witnesses opportunity was given to judge of their credibility by their manner of testifying, and their appearance on the stand. In *Bugh v. Rominger*, 15 Colo. 452, 24 Pac. 1046, the case was not tried wholly before a referee, but, as here, testimony adduced upon a former trial was introduced, and likewise additional testimony by parol. In declaring that this circumstance made it unnecessary for the appellate court to sift and weigh the evidence, it was said: "It is clear, therefore, that the case does not come within the principle announced in *Sieber v. Frink*, 7 Colo. 152, wherein it is declared to be the duty of the appellate court to sift and weigh all the evidence with a view to a just determination of the controversy, but rather within the general principle which has been repeatedly announced, that this court will neither disturb the verdict of the jury nor the finding of a trial court unless it is well satisfied that the judgment or the verdict is so unsupported by the evidence as to be against its manifest weight, or the record compels the conclusion that the verdict or judgment was the result of those influences, motives or considerations which the law does not permit

to control the findings of either court or jury." A like rule was announced and approved in *McDonald v. Wirt*, 38 Colo. 84, 88 Pac. 179.

Moreover it appears from the record that the trial judge was familiar with the country involved in the dispute. That prior to making findings and the entering of the decree he viewed the locality in question with the knowledge and consent of both parties, and with attorneys representing both sides participating therein. Under these circumstances it cannot be said that the trial court is no better able to pass upon the evidence than is this court. In any event we have carefully read and considered the record and find that the preponderance of evidence is in support of the findings of the judge of the District Court and of the decree there rendered. Upon the first trial of this cause the judge reached the same conclusion on the facts as was reached in the trial of which this proceeding is in review. Upon the record there appearing to be no reversible error the decree of the trial court should be and hereby is affirmed.

Judgment affirmed.

Decision *en banc*.

Teller, J., not participating.

No. 9610.

DURHAM v. WILSON.

1. CONTINUANCE—*Absent Witness—Materiality of Testimony*. Application for a continuance—absence of a witness, setting forth what his testimony would be. These statements being mere conclusions, *held* not a compliance with Code sec. 1908. For this reason and because no diligence was shown to secure the attendance of the witness a denial of the application was approved.
2. REPLEVIN—*Writ—Return*. The writ showed no return. *Held* that judgment of the return of the goods was a nullity.
3. PRACTICE IN ERROR—*Judgment for Relief Not Demanded*. Treated as a nullity.

*Error to Jefferson District Court, Hon. S. W. Johnson,
Judge.*

Department One.

Mr. CHARLES MCCALL, for plaintiff in error.

Mr. L. J. STARK, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

PLAINTIFF in error brought an action in the District Court against defendant in error to recover the possession of a certain truck, and for damages. The answer denied plaintiff's ownership and right of possession, and alleged ownership in defendant. It set up no claim either for possession or damages.

On the day of trial plaintiff moved for a continuance on the ground of an absent witness. This motion being overruled, plaintiff declined to offer any evidence. Defendant testified in his own behalf, that he was the owner of the truck; that it was taken from his possession "the day after this suit; that he had not had it since; that so far as he knew "it remained in possession of the plaintiff"; that its value was \$1,000, and his damages \$828. Thereupon the court entered judgment for defendant, awarding him possession of the truck, damages in the sum of \$828, and costs. To review this judgment plaintiff brings error.

Burke, J., after stating the case as above.

Plaintiff's motion for a continuance is supported by an affidavit purporting to set up what the absent witness would testify to. These statements are mere conclusions and the affidavit is no compliance with Sec. 194 of the Code, R. S. 1908. No subpoena had been issued for the witness, and no attempt was made to show due diligence, or any diligence, in procuring his attendance. The motion was therefore properly overruled.

The abstract of record contains no reference to the writ of replevin. It is, however, set out in the bill of exceptions and shows no return. It therefore does not appear that the truck was ever taken from defendant's

possession under the writ and a judgment for its return was void. *Gallup v. Wortmann et al.*, 11 Colo. App. 308-312; 73 Pac. 247.

The defendant, by answer, having demanded neither the return of the property, nor damages for its retention, a judgment granting such relief must be treated as a nullity. "The statute providing for a judgment of return and damages in favor of the defendant, expressly limits the power of the court, in the matter of the rendition of such judgment, to cases in which the defendant by his answer claims the return and damages." *Gallup v. Wortmann, supra*, 315.

The judgment is reversed with directions to the trial court to enter judgment of dismissal against the plaintiff and in favor of defendant for his costs.

Garrigues, C. J., and Teller, J., concur.

No. 9642.

MADSEN v. CARPENTER.

FRAUD—False Representation. One offering farm land for sale, represented to a proposed purchaser that a certain irrigating district had a feasible project, and would be able to apply water to the latter. *Held* not a false statement of any fact past, present, or to come, and affording no ground to vacate the purchase.

Error to Saguache District Court, Hon. Jesse C. Wiley, Judge.

Mr. J. ELZIA JOHNSTON and Mr. JAMES P. VEERKAMP, for plaintiff in error.

Mr. JOHN I. PALMER and Mr. S. M. TRUE, for defendant in error.

Mr. Chief Justice Garrigues delivered the opinion of the court.

IN August, 1913, defendant in error, Miles G. Carpenter, a farmer from Sarpy County, Nebraska, came to Moffat, Saguache County, in the San Luis Valley, for the purpose of examining and buying land, if it suited him, and moving to Colorado. After spending some ten days looking at land, he entered into a contract with Andrew Hansen, through the latter's agents, to buy a tract near the town of Moffat, at \$35.00 per acre, amounting to \$5,600.00, which contract, as far as material, is as follows: "Moffat, Colo., Sept. 1, 1913. Received of M. G. Carpenter of Sarpy County, Nebr., the sum of \$600.00, as forfeit and part payment on purchase of the following described real estate * * *. The total price to be paid for said above described real estate is \$5,600.00, and is to be paid as follows: \$600.00 receipted for hereby; \$1,800.00 March 1, 1914; \$1,600.00 March 1, 1915; \$1,600.00 March 1, 1916 interest payable annually at 6 per cent. Title to be good; and a good and sufficient warranty deed to be executed and delivered by Andrew Hansen, his heirs or assigns, on or before March 1, 1914, together with a complete abstract of title. If the title is good and M. G. Carpenter does not make the payment of said balance of \$1,800.00 on or before March 1, 1914, then the payment of \$600.00 is to be forfeited as partial liquidated damages. If this title is not good and cannot be corrected within a reasonable time, then the payment of \$600.00 is to be returned to said Carpenter. Possession to be given March 1, 1914."

Carpenter took possession of the premises, and, March 1, 1914, made the cash payment of \$1,800.00, and executed two promissory notes for \$1,600.00 each, one payable March 1, 1915 and the other March 1, 1916, secured by trust deed, and Hansen deeded him the land.

April 2, 1915, Carpenter brought this suit to rescind the contract and to recover the \$2,400.00 paid thereon, and to cancel the notes representing the deferred payments, and tendered a deed conveying the land back to Hansen. Pending the trial defendant died and his administrator was substituted.

The complaint alleges that plaintiff was a resident of Nebraska, not familiar with irrigation, and ignorant of the value and productiveness of lands in the San Luis valley, which matters were all known to defendant; that, to induce him to purchase the tract, defendant falsely, fraudulently and knowingly represented to plaintiff that it was a number one farm worth \$35.00 per acre, and as good land as any in that vicinity, and that no land of that quality in the locality could be purchased for a less amount; that on account of its being situated within the boundary of the Moffat irrigation district the land would be entitled to receive sufficient water from the district for irrigation; that the district had developed sufficient water to properly irrigate all the land and had purchased machinery with which it would develop additional water, and that the alkali on the land was a good fertilizer; that these statements were false and known by defendant to be untrue when he made them, and were made to deceive plaintiff; that the value of the land did not exceed \$15.00 per acre and that plaintiff relied upon the false statements and would not have contracted to purchase the land had he not believed them to be true.

The court found the issues for plaintiff, and entered a judgment and decree ordering that the contract be cancelled and rescinded, and the sale held for naught, and that plaintiff recover from defendant the \$2,400.00 paid thereon, with interest, less \$500.00 as rental, and that the two notes of \$1,600.00 each be cancelled and delivered to plaintiff.

Garrigues, C. J., after stating the case as above.

Plaintiff's cause of action is predicated upon alleged fraudulent representations regarding the water rights and the status of the Moffat irrigation district which it was supposed would furnish the land with water for irrigation; and the quality, character and value of the land. The second point might be ignored as immaterial because plaintiff testified that, while the soil was not as represented, still the failure to get the water was the only thing about which he complained; that, if the district had furnished the water as

represented, he would have been satisfied and gone ahead with the deal. The tract was pasture and hay land, and had never been farmed or irrigated and no water was bargained for, promised, conveyed, or went with it. Plaintiff was told and understood that no water went with the land, and that he was purchasing no water right, and that the water would have to come from the irrigation district which had just been formed, and was installing a pumping proposition. Plaintiff testified in substance that the agent represented to him in August, 1913, that the following year, that is 1914, the irrigation district would have its system so developed that he would be able to get water for the land, and that he would not have executed the contract and bought the land if he had not thought so; that he intended to farm the land when he bought it, but soon saw he could not get any water and never plowed any of it up; that the agent said that the plan was feasible, and that the district would be able to furnish water for the land; that it had a pumping plant six miles north of town, and a water proposition on Crooked creek that it was going to use as soon as they could get hold of it; that the pumping plant would develop sufficient water; that the most of the talk was as to the source of the water; that the agent represented that the irrigation district had water for the land from the pumping plant, and took him out to the plant to examine it before he signed the contract; that he never made any demand for the water, and didn't think he had to because he understood the land in the district was taxed, and they were bound to furnish the water without its being demanded; that the agent showed him the pumping plant as a proposition that was going to be installed; that he saw where they had been pumping water but did not measure it; that no one showed him any water that was for, or that went with, the land, or that could be used upon it; that there was no ditch conveying water to the land; that the irrigation district was to make a ditch and put it through to the land; that the agent brought a local newspaper along and read an article as to when they were going to install the machinery for the

pumping plant, and in August, 1913, took him to interview the board about it and the board told him they had a contract with the Austin people for two dredges, and would start operations in the spring of 1914, as soon as the frost was out; that they showed him some ditches already made from the pumping plant to other land in south of Moffat; that the agent represented that the water they had already developed would hold us fellows that were coming in there up until they had the other water going; that he went to see the board personally because he wanted to find out from them about the water source and that he found out about it by inquiring at Moffat; that he never plowed up any of the ground or attempted to put it in crops because after he had the land a little while he found out he was not going to get the water; that he would have gone ahead if the district had furnished the water for the land the following spring, and would have been satisfied with the deal; that the failure to get the water was the only thing about which he complained, although the soil was not as good as represented; that the agent induced him to interview the board about the water and went with him but that nobody represented to him that there were any ditches built from which he could irrigate the land, but that the district was supposed to put them in, and represented that it would be done.

From reading the whole evidence given on the trial, it is plain that defendant's agent only expressed an opinion that the proposition was feasible, that the district would be able to supply water for the lands lying thereunder, and that defendant would be able to get water for the land from the district, which was not a false statement as to a past, present or existing fact. As a matter of fact the water system was not feasible but was a failure, and plaintiff, as soon as he found this out, had the land withdrawn from the district and never paid any district taxes, and the district subsequently was dissolved.

As to whether it was a valuable piece of land, or would grow anything that the climate would grow, or as good crops as could be grown in that locality or climate, or grow

any crops at all, or whether it was good soil or poor soil, or was worth \$35.00 an acre, were mere expressions of opinion. Plaintiff had been a farmer all his life and came to Colorado and spent a week or ten days personally visiting the locality and conversed freely with the farmers and people about Moffat, and stayed all night there with an old farmer friend from Nebraska for the purpose of finding out about the lands, and went all over and around the land and dug holes in it with a spade and investigated personally the character of the soil, and conversed fully with the officers of the irrigation district, learned their plans, and visited their plant before he signed the contract. He came back again to Colorado on the 15th of February, 1914, and made another thorough investigation both of the land and water system before completing the deal.

Under such circumstances the finding, judgment and decree cannot stand. *Muir v. Pratt*, 18 Colo. App. 363, 369, 71 Pac. 896; *Everist v. Drake*, 26 Colo. App. 273, 283, 143 Pac. 811.

Judgment reversed and cause remanded with directions to dismiss the action.

Mr. Justice Teller and Mr. Justice Burke concur.

No. 9231.

RIO GRANDE RESERVOIR AND DITCH CO. v. WAGON WHEEL
GAP IMPROVEMENT CO.

1. **WATER RIGHTS—Abandonment.** The mere expressed intention to abandon a right in water is without effect to deprive the owner so expressing himself,
2. —*Seepage*, escaping from a reservoir is part of the stream from which it was diverted. It is regarded as already appropriated by those having adjudged priorities and is not subject to appropriation.
3. In *Ironstone Ditch Company v. Ashenfelter*, 57 Colo. 31, the only question for decision was whether the proposed change would

injuriously affect vested rights to the use of water from a particular stream. Expressions of the opinion upon other questions declared *dicta*.

4. ADJUDICATION OF PRIORITIES—*Decree*. Doubted whether a decree for direct irrigation can be granted in a proceeding to secure storage rights.
5. —*Discriminations—Relief*. The court below having denied the benefit of the doctrine of relation as to plaintiffs in error, who were shown to be entitled to it, the decree was reversed with specific directions to the court below to allow the several appropriations claimed by plaintiff, and the date and volume of each.

As to the affirmance of the decree disallowing a decree for direct irrigation, Garrigues, C. J., and Burke and Denison, J. J., dissent.

*Error to Costilla District Court, Hon. A. Watson
McHendrie, Judge.*

Mr. JESSE STEPHENSON, Messrs. GOUDY, TWITCHELL & BURKHARDT and Mr. FRANK B. GOUDY, for plaintiff in error.

Mr. J. T. ADAMS, Mr. EZRA T. ELLIOTT, Mr. CHARLES M. CORLETT and Mr. GEORGE M. CORLETT, for defendants in error.

Mr. JAMES W. MCCREERY, Mr. DONALD C. MCCREERY, Mr. STOTTON R. STEPHENSON and Mr. HARRY N. HAYNES, Amici Curiae.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFF in error, The Rio Grande Reservoir and Ditch Company, was awarded certain priorities for 43,565.06 acre feet of water for storage purposes in the Santa Maria reservoir in an adjudication proceeding in Costilla County. At the same time other awards were made to the several defendants in error, all of prior date to that of plaintiff in error. In the same adjudication plaintiff in error was denied a decree for an original appropriation for direct irrigation, for the Santa Maria Seepage Ditch, and brings the record here for review on both propositions.

The matters for determination are, whether upon the evidence the date of the decree awarded to the Santa Maria Reservoir should have been earlier, and whether the capture of the seepage water by the Santa Maria Ditch can be regarded as such an original appropriation as to entitle it to a decree antedating all other appropriations for water for direct irrigation on the stream to which such seepage is plainly tributary.

Upon the first question it appears that the Santa Maria reservoir was originally a small lake, the basin surrounding which was surveyed by one Thorne in August, 1896, for the purpose of locating a reservoir site. The Rio Grande Reservoir & Ditch Company was then organized and a map and statement prepared for it by Thorne was filed in accordance with the federal act of 1891, for the purpose of obtaining a right of way over public lands.

By this map and statement the reservoir company claimed a reservoir capacity of 15,971.2 acre feet, which claim was lodged with the State Engineer on October 8, 1896. On December 5, 1896, the company was notified by the Secretary of the Interior that approval of the filings would be held in abeyance because of international complications with Mexico in relation to the diversion of water from the Rio Grande river in New Mexico and Colorado. At this date the company had expended over \$4,000.00 in preliminary preparations and construction. It continued to expend money on the project, and to do, everything that could reasonably be done in the absence of a right of way across the public domain, to protect and perfect its claim.

In 1901 the company determined to increase the capacity of its reservoir, and until November, 1907, when its application for the right of way was approved, it constructed ditches, built a dam, made numerous surveys for its inlet ditch, and in other ways expended upon the project, while the approval of its application for the right of way was pending, approximately \$12,000.00.

An amended map and statement was filed in the office of the State Engineer, in August, 1906. Work of some

kind was done upon the project in 1907, 1908 and 1909, and in October, 1911, water was turned into the reservoir, which was used in 1911 upon lands to a total amount of 4,800 acre feet. In 1913 the amount so stored and used was 9,600 acre feet. In November, 1913, the reservoir was completed to its full capacity.

It is claimed that the court in its decree failed to give this company the benefit of the doctrine of relation, although that doctrine was applied in behalf of all other claimants. It is urged that upon the evidence the company's priority should bear date as of August 7, 1896, the time of the original survey by Thorne. The record substantially supports the contention of the company that the decrees awarded defendants in error, of date superior to its decree, are based upon less evidence of work done, money expended and diligence employed, than that upon which it relies. It is urged that the provisions of section 3284, R. S. 1908, requiring the consideration of the diligence with which the work was in each case prosecuted, the nature of the work as to difficulties encountered, and all such like facts tending to show compliance with the law, in securing the priority claimed, was disregarded as to this complainant, but recognized as to all the others, and that the court utterly ignored the natural difficulties connected with the project, and the delay occasioned by the federal authorities in granting the right of way, when it determined that due diligence had not been exercised by the company in putting the water to a beneficial use.

It conclusively appears that work was done or money expended by plaintiff in error in this property in every year from 1896 until 1909. During all but two years of this period the project was held in abeyance by federal order. The other reservoirs to which senior priorities were awarded were found to have exercised due diligence up to the time of their respective approval by the Department of the Interior, although their claim of diligence is supported by testimony identical with that offered by plaintiff in error in support of its claim. The trial court,

however, applied the doctrine of relation to them, and refused it as to plaintiff in error, giving it a priority as of July 10, 1910, instead of August 7, 1896.

From the brief of defendant in error it appears that the findings complained of were based on a certain letter written by the manager of several of the reservoir companies, but not of the one which owns the Santa Maria reservoir. The letter purports to show that the companies for which the writer was manager had abandoned the idea of constructing the reservoir, and from the testimony of the writer and of others it appears to have been written to mislead rival companies as to the true intentions of plaintiff in error, with a view to obtaining land needed for the Santa Maria reservoir at better prices. It can not, however, in any way bind the plaintiff in error, because it at all times diligently continued work on the project, and on the reservoir site referred to in the letter. Under the law an expressed intention to abandon does not cause forfeiture of rights unless possession is relinquished and acts of ownership cease. The letter, therefore, is not sufficient to justify the conclusion reached by the trial court that plaintiff in error had once abandoned the property and returned to it again in 1910.

As to the denial of an original appropriation for direct irrigation for the Santa Maria seepage ditch it appears that after the Santa Maria reservoir was filled seepage water therefrom appeared at the base of one of the adjacent hills. The ditch in question was then constructed, such seepage water captured and measured over a weir. It was sought to appropriate this seepage water and conduct it by ditch to the gates of a canal belonging to the company far down the stream and there apply it to lands under that system, for direct irrigation purposes. The right is based upon the theory that the waters having been impounded in the reservoir during the winter months when direct irrigation is impossible, have not been and could not have been appropriated for direct irrigation. *Iron Stone Ditch Company v. Ashenfelter*, 57 Colo. 31, 140 Pac. 177, is relied upon as authority to support this contention.

The question involved, as we view it, has been definitely settled against this contention in *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107, where this court makes the following announcement under conditions similar to those involved in this case: "We take judicial notice of the fact that practically every decree on the South Platte River, except possibly only the very early ones, is dependent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible. To now permit one who has never had or claimed a right upon or from the river to come in, capture, divert and appropriate waters naturally tributary thereto, which are in fact nothing more or less than return and waste waters, and upon which old decreed priorities have long depended for their supply, would be in effect to reverse the ancient doctrine 'First in time, first in right', and to substitute in its stead, fortunately, as yet, an unrecognized one, 'Last in time, first in right.' * * *

"Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees. To now permit independent appropriation and diversion of these waters in a way to adversely affect prior appropriations and decrees is in direct conflict alike with the spirit of the law under which such priorities have been decreed and the practical purposes for which these appropriations have been made and recognized. It is a well known fact that practically all appropriations down the stream are dependent on return, waste and seepage waters for their supply. If a part of these waters may be cut off, then all of them may be, with the result that the stream might thus be wholly depleted, and all appropriations and decrees, no matter how early, below the points where such waters are diverted,

would be stripped of their rights and rendered useless and of no practical worth or value.

"There is no law anywhere to support the contention that if these waters are naturally tributary to the river, still they may be taken by a new claimant to the damage and injury of prior appropriators upon that stream, simply because he captures and diverts them before they actually get into the river channel. If such act of capture and diversion can be upheld as lawful and proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream. When it is shown or admitted that these waters ultimately return to the river and thereby augment and replenish its flow, they are * * * as much a part thereof as when they actually reach the stream. Whenever these waters start to flow back to the river and it is apparent that they will reach it, they constitute a part of the stream and are not subject to independent appropriation as new or added water, or because they have been used to serve one priority and have been thus artificially brought into that position."

This rule was followed and approved in *Trowel Land & Irrigation Co. v. Bijou Irrigation District*, 65 Colo. 202, 176 Pac. 296, in the following language: "The law makes no distinction as relates to the return of water to the stream between that from a reservoir supplied by a natural stream, or from a ditch supplied directly from the stream, regardless of the fact that the reservoir may be chiefly supplied in time of high water, or in the non-irrigation season.

"In the Ramsay case, the seepage water involved escaped water both from a reservoir and ditch, and it was there said, speaking of the identical stream here involved: 'Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the

river, and naturally returning to it, is available to supply such appropriations and decrees."

That part of the opinion in *Iron Stone Ditch Co. v. Ashenfelter*, *supra*, quoted by plaintiff in error in support of its contention, is purely gratuitous and volunteer matter, and not responsive to any issue in that case. This is plainly apparent since the proceedings there brought were to change the point of diversion of certain appropriations, and the only question for decision, and the only point which could have been properly decided, was whether the proposed change would injuriously affect vested rights to the use of water from that stream. The dictum relied upon cannot be held to overrule former decisions of this court, nor do we think there was any purpose or intention to do so. In any event, the matter in this opinion relied upon can be considered only as the individual opinion of a single justice of this court, and of course, while persuasive, can in no sense be held to be the opinion of the court, much less can it be accounted as overruling our decisions which distinctively declare a different rule.

There is not, neither can there be, any question in this case of newly developed or added water, which subject presents a different question from the one actually involved, so that any such discussion is futile and wholly beside the case, since the seepage water under consideration, on the evidence adduced, is manifestly tributary to the Rio Grande river, from which stream the Santa Maria reservoir secured its storage appropriation. To permit the recapture of the seepage water from such reservoir, while on its way back to the river to which it is tributary, and allow it to be applied to land many miles down the river, under a claim of original appropriation for direct irrigation, prior in time to all other appropriations on the stream, would plainly constitute a wrongful use of water by the reservoir company, and would completely overturn the doctrine, so firmly established in this jurisdiction, that prior appropriation and use give the first and better right. *German Ditch & Reservoir Co., et al. v. Platte Irrigation Co.*, 67 Colo. 390. 178 Pac. 896.

It is easy to see how decrees for seepage water for direct irrigation, if made subject to vested rights, may properly be allowed, and that such decrees might at times and under certain conditions prove most beneficial, but it is equally plain that, under a system of re-appropriation of seepage and return waters indefinitely carried on, awarding priorities antedating all others on the stream, the value of old rights might be not only greatly impaired, but utterly destroyed. Moreover, this proceeding was brought to obtain a decree for storage rights only, and it is of doubtful import whether in any event a decree for direct irrigation could properly be allowed in such action.

The findings and decree of the trial court will be reversed as to the date of the appropriation awarded plaintiff in error for storage in the Santa Maria reservoir and the cause remanded with directions to the court below to modify the decree and award plaintiff in error a storage capacity as of August 11, 1896, for 15,871.21 acre feet, of which 9,600 feet is absolute; also a priority as of September 22, 1902, for 27,954.85 acre feet, which together with the remainder of the August 11, 1896, priority, is conditional. That part of the decree denying an appropriation of seepage water to the Santa Maria seepage ditch for direct irrigation, antedating all other direct irrigation decrees on the stream, is affirmed.

Decision *en banc*.

On the reversal of the judgment as to date of the reservoir priority, all concur. On the affirmance of the disallowance of a decree for direct irrigation, the Chief Justice and Mr. Justice Burke and Mr. Justice Denison dissent.

Affirmed in part and reversed in part.

Garrigues, C. J., dissenting.

It is manifest that the rights of plaintiff in error depend upon whether the water in question is a tributary and a part of the flow of the river. The majority opinion can only be sustained upon the assumption that it is a tributary and belongs to the natural flow of the stream. I think, under the evidence, that the disputed water is extraneous to the

natural or regular flow of the stream, which was only being used as a conduit. Plaintiff does not claim a priority, but seeks recognition from the court and water officials of its rights to the water and the use of the stream as a conduit for its distribution. The majority opinion denies this right and holds that it will destroy the value of old ditch priorities. From this part of the opinion I dissent.

The majority opinion is based upon *Comstock v. Ramsay*, 55 Colo. 244. The law as announced upon the statement of that case necessary for its decision is undoubtedly correct, and has always been the undisputed rule in this state; no one claims the contrary, although there are some expressions and dicta in that opinion which might have been omitted with propriety. It in fact decided but one point, namely, that a junior appropriator cannot divert the water of a tributary to the detriment of a senior upon the main stream. The court in that case, at page 256, says: "What and all we do intend to here determine, on this particular point, is that where it appears that such waters are in fact tributary to the stream, and form a substantial and material source of its supply, upon which appropriators therefrom have long depended for water to satisfy their priorities, that then, as between such *bona fide* appropriators and users of such waters and a new claimant, the former has the first and better right."

With that I think every irrigation lawyer in Colorado can agree. No one claims here that a junior appropriator can take the water of a tributary to the detriment of a senior upon the stream. What I deny in this case is that the impounded water flowing in this seepage ditch at the base of the dam ever became, under the facts and circumstances of this case, a natural watercourse, or a part of the natural flow, or a tributary of the river.

I lay down, as the first point in the discussion, that water which one has saved, developed or produced, or which comes from an independent or extraneous source to the natural irrigation flow of the stream, and has been put into the river as a conduit by the producer or owner for

the purpose of taking it out and using it lower down the stream for irrigation, belongs to the one who put it into the stream as against all priorities; or, put in a way already expressed by this court, one who by his own efforts, increases the natural flow of a stream either by *saving* or developing water is entitled to its benefit to the extent of the increase as against all consumers, regardless of priority. The right is not based upon priority, and the stream is only used as a canal or conduit. This rule is sustained without an exception by every authority in every irrigation state. *Platte Val. Irr. Co. v. Buckers Irr. M. & I. Co.*, 25 Colo. 77; *Ripley v. Park Center L. & W. Co.*, 40 Colo. 129, 133; *Ironstone D. Co. v. Ashenfelter*, 57 Colo. 31, 42, 43, 44; *McKelvey v. N. S. Irr. Dist.*, 66 Colo. 11, 179 Pac. 872; *Churchill v. Rose*, 136 Cal. 576; *Pomona L. & W. Co. v. San Antonio W. Co.*, 152 Cal. 618, 623; *Miller v. Wheeler*, 54 Wash. 429; *Schulz v. Sweeny*, 19 Nev. 362. Our statute expressly confers this right to the use of the stream.

In the Buckers case, 25 Colo. 77, it is expressly held that one who increases the average continuous flow of a stream by his own energy and expenditure is entitled to the increase, and the use of the stream as a conduit, as against all other consumers on the stream, regardless of their priority. This case has never been modified unless it was intended to silently overrule it in the Ramsay case. It has often been followed and quoted in other states and is authority that one is entitled to the increase to the natural flow which he put into the stream with the intention of taking it out for irrigation use. The three Buckers cases, 25 Colo. 77, 28 Colo. 189, and 31 Colo. 62, involve the same water. Beaver lake was an old bed of the river and Beaver brook was its outlet, and adjacent sloughs caused by seepage from irrigation were the source of supply of Beaver lake and of Beaver brook, the latter being a natural water-course and a tributary of the Platte river. The Buckers company constructed Beaver lake ditch, a seepage drain ditch, which intercepted and diverted the water from Beaver brook. It claimed the use of the water as against

prior appropriators upon the main stream (the Platte river) upon the theory that it had developed the water by draining adjacent lands, and had thus increased the natural flow, and was entitled to the increase. The lower court found on the first trial (reported in the 25th Colo.) that Beaver brook was a natural watercourse, and that the Buckers company had increased its natural flow by the drainage of seepage lands adjacent thereto, and therefore was entitled to *all* the water flowing in Beaver brook. Mark the word "all". The case was brought here and reversed upon the ground that the court erred in giving the Buckers company *all* the water of Beaver brook. We held, Beaver brook being a natural watercourse and tributary of the Platte river, the company was not entitled to *all* the water as against senior appropriators, but expressly held that it was entitled to the use of the water in dispute *to the extent that it had increased the natural flow*. The error of the lower court specifically pointed out, and for which the case was reversed, was in giving it *all* the water, both that which it claimed to have developed as well as the natural flow of the stream. For this error the judgment was reversed and case remanded and a retrial had which was reviewed by us and reported in the 28th Colo. where, at page 189, it is said: "From this judgment (that is the former judgment giving defendants all the water) the plaintiff appealed to this court, where, upon consideration of this branch of the case it was held that the court erred in decreeing the present appellants (the Buckers company) all the water from this source, because they were only entitled to the water flowing from Beaver lake to the extent they had increased its average continuous flow." So, we see, in the 28th Colo. we expressly reaffirmed the rule theretofore so strongly pronounced in the 25th Colo. In the syllabus in the 28th Colo., at page 187, it is said, in speaking of the case in the 25th Colo.: "The appellate court sustained the lower court to the extent that such junior appropriators (the Buckers company) were entitled to the increase of water they had caused to flow in the

stream, but reversed the judgment because it decreed them *all* the water in the stream instead of only the increase and the cause was remanded for a new trial," for this reason. On the third trial over the same water the lower court found on conflicting evidence that there had been no increase of the natural flow; that the apparent increase was only a concentration of the water present in the sand and gravel, forming the natural channel, and the banks adjacent thereto; that the Buckers company had added no water to the natural flow, but had simply intercepted the natural surface flow in the channel, and the water saturating the sand and gravel constituting the bed and banks of the channel, which amounted to a diversion of the surface and subterranean flow of the natural stream; that, for this reason, the water they claimed to have developed, was not an increase, but was in fact taken from the stream itself. This finding of the lower court was affirmed in 31 Colo. 62, but it accentuates the rule theretofore announced and in no way abrogated, modified or changed the former decisions. The case adheres to the rule of law announced in the two former cases, that one who increases the natural flow of a stream is entitled to the increase.

Where one, by his own energy and expenditures, with the intention of using it for irrigation, adds to the natural flow of a stream, it does not become a part of the natural flow and such water though commingled, to distinguish it from the natural flow, has been given various names by the courts, such as, "the increase," "independent water," "artificial water," "developed water," "saved water," "excess water," "new water," "free water," "water from an extraneous source," "artificial accretion," etc., but whatever the name, and whether saved water or developed water, it is universally held in all the irrigation states, that the one saving or developing it and adding it to the stream has a right to its use, and the use of the natural stream for its distribution, and to divert therefrom an equivalent amount for irrigation. This principle was announced by the Supreme Court of California as early as *Butte Co. v.*

Vaughn, 11 Cal. 143. In *Creighton v. Kaweah C. & I. Co.*, 67 Cal. 222, it is said: "At best the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed, unaided by artificial means, with which the plaintiff is not connected."

The matter is fully discussed in *Wiggins v. Muscupiabe L. & W. Co.*, 113 Cal. 195, where the right of one to its use who either *saves* or develops water by artificial means is elaborately considered. In *Churchill v. Rose*, 136 Cal. 576, it is held that where one increases the natural flow of a creek, he is entitled to the increase as against all other appropriators. In *Pomona L. & W. Co. et al. v. San Antonio W. Co. et al.*, 152 Cal. 623, the whole matter is again reviewed, and many cases cited, and among others the Buckers case, and it is held that such water, unless abandoned, does not become a part of the natural flow of the stream, and belongs to the person causing the increase. In closing the court says, at page 624: "This same doctrine is recognized by all the courts which have been called upon to consider it."

In *LaJara v. Hansen*, 35 Colo., at page 109, it is said: "After waste waters reach the stream, unless there is then an intention by the owner to reclaim them, they become a part of its volume, and inure to the benefit of the appropriators of its waters, to be enjoyed in accordance with their numerical priorities." In *Ripley v. Park Center L. & W. Co.*, 40 Colo., at page 133, we held, that artificial water, that is water produced or developed from a source extraneous to the natural flow by the efforts of others, and put into the stream as a conduit for the purpose of taking it out and using it lower down for irrigation, belongs to those causing the increase, and is no part of the natural stream unless abandoned. In *Comstock v. Ramsay*, 55 Colo., at page 256, it is said: "When such waters leave the control of the original appropriator, having been used either for direct irrigation or reservoir purposes, without intention of recapture or further use, by him, they immediately become

a component part of the river, and cannot be lawfully diverted from their course to it by independent appropriation, to the injury of those having decreed priorities therefrom." In the present case there was an intention to recapture and further use. Of course after any water reaches the stream, unless there is an intention by the owner to reclaim it, it becomes a part of the natural flow of the stream, but what I contend is, if it was put in with the intention of taking it out and using it, it belongs to the person causing the increase.

In the fourth paragraph of the syllabus to the Ashenfelter case, 57 Colo. 31, it is said: "Whoever has developed water from a source extraneous to the stream may discharge it into the stream, and, using the stream as a conduit, withdraw it below." In *McKelvey v. North Sterling Irr. Dist.*, 66 Colo. 11, 179 Pac. 872, it is said in the first paragraph of the syllabus: "Water seeping through a dam may be recaptured (by the owner) by means of an irrigation ditch and other persons have no right to appropriate it." This is an exact parallel of the instant case, and yet no mention is made of it in the majority opinion.

In *Miller et al. v. Wheeler et al.*, 54 Wash. 429, a recent and well considered case, concurred in by the full bench, it is held, where one, by his own exertion, energy and expenditure, increases the natural flow or available supply of water in a stream, he has the right to its use to the extent of the increase, and may use the stream as a conduit for its distribution. This is a leading case and similar in many respects to the Buckers case, which it cites and follows. In that case seepage water caused from irrigation formed bogs and marshes on defendant's land, and the act complained of by plaintiff was the digging of a ditch and draining the marshes into the natural stream, which defendant used as a conduit, and taking the equivalent therefrom for irrigation as against plaintiff, a senior appropriator on the stream. At page 433, the court says, the question is: "Whether the water from this artificial source (irrigation), having naturally gravitated into the

soil, and percolating therein, may be ditched and drained for further use by the owners as against the right of a lower appropriator; in other words, whether percolating waters arising from an artificial source become a natural flow of an existing watershed and a part of its drainage stream."

The court, in answering this direct question, says, that it may or may not, according to the facts in each particular case, depending upon the question of abandonment, but the court holds that the seepage water developed by drainage in that particular case, there being no abandonment, did not become a part of the natural flow of the stream, and that the parties causing the increase were entitled to its use, as against all other consumers on the stream. No question of priority involved. It reviews many cases and upholds the universal rule that one is entitled to divert the amount he has increased the natural flow as against all prior appropriators on the stream. The artificial means of increase in that case was the drainage of lands seeped by irrigation, and the court held that this water, under the circumstances of the case, was not a natural flow of the stream, but increase. The above cases have been cited for the purpose of showing the established rule that one who increases the flow of a natural stream is entitled to the increase.

The second point is whether the conditions above mentioned are met. That is, whether plaintiff increased the natural flow of the stream without any intention of abandoning the increase.

Whether waste water escaping from a reservoir is a tributary where no tributary existed before the construction of the reservoir depends upon the facts and circumstances of each particular case. There was no abandonment of the water in this case. On the contrary, the evidence shows an intention to recapture and use the escaping water, so the element of abandonment is eliminated, and the case must be decided upon the theory that there was an intention to recapture and use the escaping water.

The evidence shows plaintiff saved and added to the stream a volume of water not theretofore wont naturally, or at all, to flow down the stream at that time and place. It diverted, stored, and saved unused and unappropriated water which, had it not done so at the time, would have gone out of the state and been lost to everyone for direct irrigation. Hence I say it was water saved by plaintiff at a time and place when no appropriator for direct irrigation had any interest in it. For this reason, it was immaterial to those having decreed priorities of appropriation for direct irrigation what became of the water plaintiff impounded for it was saved at a time when in no event could they have used it. What I mean is, the water plaintiff saved from being lost came into the reservoir from a source extraneous to the natural irrigation flow of the stream, and the escaping water was an artificial increment to the stream over the natural flow and belongs to the one who saved it. The point I wish to make is that water saved, which would be otherwise lost, belongs to the one who saves it. I think the owner may, in constructing a reservoir, in anticipation of leakage, construct a drain ditch or ditches below the dam to recapture escaping water, and has the right to apply it to the same beneficial use as the water within the reservoir as against all appropriators on the stream when his intention to do so is manifested in due time. The water stored in a reservoir does not depend on any rule of priority except as to filling, but is water saved, and the right to its use belongs to the one who saved it.

It simply goes back to the first proposition that one who increases the natural flow by saving water that otherwise would be lost is entitled to the increase. The fact that this water was stored is proof sufficient that it would not have been saved, but would have gone down the river into the Gulf of Mexico, except for the energy and expenditure of plaintiff. No rights ever accrued to others in anticipation of this water. Its use was never available nor anticipated for direct irrigation prior to the construction of

the reservoir, and no right was ever founded upon it. It is as much saved water to which plaintiff had the right as though it had been drawn directly from the reservoir for the purpose of putting it into the stream for transportation.

It has been suggested that the water escaped from the reservoir against the will of the owner, therefore he is not entitled to recapture it. But why should that make a difference, if the intention to recapture it was the same as the intention to recapture water voluntarily released from the reservoir? It seems a strange doctrine that one cannot recapture his property that has involuntarily escaped.

In the majority opinion it is stated: "Every appropriation of water on the stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees." No doubt all decreed priorities of appropriation on a natural stream are based upon the theory that the flow of the stream and its tributaries from any source that has become an integral part of the stream shall inure to the benefit of all appropriators on the stream in the numerical order of their priorities. But I deny that any appropriation or decree is made or based upon the theory that independent or extraneous water, or water that has been saved in a reservoir, and is being conveyed for distribution, using the stream as a conduit, will inure to the benefit of any priority or to any person except the one who saved it.

In the third paragraph of the Ashenfelter case, 57 Colo. 31, it is said: "Seepage water which is being wasted is the subject of appropriation. The appropriation thereof is not included in or controlled by a prior adjudication decree in the same district."

If the majority opinion intends so to state, it is a grievous misstatement to say that prior appropriators on this stream long depended, or ever depended, upon this disputed water to satisfy their priorities. It was saved to the stream long after their rights accrued.

The majority opinion states that the question is, "whether the capture of seepage water by the Santa Maria ditch can be regarded as such an original appropriation as to entitle it to a decree prior to all other appropriators on the stream to which seepage is tributary." This does not state the question correctly. In fact, I do not see how it could be stated more incorrectly. No such claim is made and no such question is involved. What plaintiff claims is recognition of the right it already had to use the impounded water in dispute, regardless of priorities, upon the theory that it is excess or increase which it produced and put into the stream without any intention of abandoning, but as a conduit for transportation, with the intention of taking it out and using it lower down for irrigation.

The majority opinion further states: "If such act of capture and diversion can be upheld as lawful and proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream." This is begging the question. Plaintiff is not diverting the water of a tributary, or claiming the water by virtue of priority of appropriation. It only asks the right to take the increase it saved and put into the stream. It asks no part of the natural flow. This water is not a tributary in the sense that it is a part of the flow of a natural stream. All that plaintiff needs or seeks is recognition by the police officers on the stream of its right to the use of the water it saved, and the use of the stream as a conduit, and it is proper that the courts should grant such recognition in an adjudication proceeding, as a guide to the water officers. This course was pursued in *McKilvey v. N. A. Irr. Dist.*, 179 Pac. 872. I think the case should be reversed

and remanded to the lower court to enter a decree in the adjudication proceeding in accordance with the views I have herein expressed.

Denison, J., dissenting.

I dissent from the opinion of the majority and concur in that of the Chief Justice.

For convenience in this discussion, I shall use the term "direct supply" as equivalent to "that part of the water of the stream available for direct irrigation."

The statement in the majority opinion that the question before us is: "Whether the capture of the seepage water by the Santa Maria ditch can be regarded as such an original appropriation as to entitle it to decree prior to all other appropriators on the stream to which such seepage is tributary" is inaccurate.

The water in question is not ordinary seepage and conclusions based on the theory that it is so will be unreliable, and the principal question is not whether the capture of it is a valid appropriation, but whether the owner of the reservoir from which it has escaped has a right to it without appropriation.

It is either mere leakage from the reservoir or else it is an accretion or addition to the direct supply. It must be either one or the other, because it was not there before the reservoir was filled. If it is not mere leakage it may perhaps be called seepage but in that case it must be an accretion or addition to the direct supply, because, since no portion of the direct supply can be lawfully used to fill the reservoir, it follows that all the water, the winter water, for instance, put into the reservoir and released in the irrigation season, must, with mathematical certainty, be an addition to the direct supply.

I think this water is leakage. True, some of it comes through a ridge, a natural barrier, but that is essentially a dam and is used by the constructors of the reservoir as a part of their dam. Even if it were not a part of the dam, nevertheless, when reservoir water escapes it is leakage, and if so, and if it can be identified as from the reser-

voir, it of right ought to be and is, certainly, the property of the owner of the reservoir as much after it escapes as before—until he abandons it. If the water in the reservoir is his and escapes against his will, and he has not abandoned it, how does it cease to be his?

If he may retain the leakage by a cement lining on the inside of his dam, why not by a cement retaining wall on the outside of it, It is as if he had it in a tub out of which it leaked and he caught it in a pail.

If not leakage it is an accretion or addition to the stream and as such belongs to him who created the addition, as shown in the opinion of the Chief Justice.

On Petition for Rehearing.

Per Curiam:

The sole question determined as to seepage water is that no decree, on the facts of this case, for an appropriation thereof by the reservoir company, for direct irrigation, antedating all appropriations from the river for like use, can lawfully be awarded. No other question, upon the subject of seepage, has been presented, considered or adjudged herein.

Rehearing denied.

No. 9692.

BOWER v. POUND.

1. EQUITY—*Laches*. The failure to prosecute diligently a suit seasonably begun is laches. Especially where during the delay the property has greatly increased in value.
Improvements made by defendant during the delay afford an additional reason to deny the relief demanded.
2. PRACTICE IN ERROR—*Judgment*. The party successful below appearing by the record not entitled to any relief, the judgment was reversed and the lower court directed to dismiss the action.

Error to Sedgwick District Court, Hon. L. C. Stephenson, Judge.

Messrs. MUNSON & MUNSON, for plaintiff in error.

Messrs. ALLEN, WEBSTER & DRATH, for defendant in error.

Mr. Justice Allen delivered the opinion of the Court:

THIS is an action which, as between the parties in interest upon this review, is a suit for the specific performance of a contract for the sale of certain real estate. The relief is sought by the vendee against the vendor. The contract is in writing, and is dated and reads as follows:

“Julesburg, Colo., Feb. 19, 1908.

“Received of William H. Pound the sum of One Hundred Dollars (\$100.00) as part payment for the purchase of the following described real estate to-wit: Lot 5, in Blakesley's Subdivision of Lots 1 and 2, in Block 11, in the Original Town of Denver Junction, now Julesburg, in Sedgwick County, Colorado, the said lot the said William T. Bower has this day sold to William H. Pound. The entire price to be paid by William H. Pound to William T. Bower for said above described lot is Two Thousand Dollars, and is to be paid as follows: One hundred dollars cash paid at the time of the signing of this agreement or memorandum, and the balance is to be paid at the time the deed is delivered. The title to the said lot to be perfect, and the deed above mentioned is to be a good and sufficient warranty deed, to be signed and acknowledged by William T. Bower and his wife and delivered to William H. Pound, his heirs or assigns, on or before March 19, 1908. The said William T. Bower is to furnish abstract of title to said lot, showing the title to said lot to be clear and perfect, and is to be furnished at least ten days before said deed is delivered. If title is not perfect, said Bower shall perfect title within thirty days from this date.

"WITNESS our hands and seals this 19th day of February, A. D. 1908.

W. T. BOWER,
WILLIAM H. POUND,

"In presence of L. H. Eversman."

Shortly after this contract was made, Bower submitted to Pound an abstract of title, and Pound found or regarded the title as being imperfect. Thereafter, and on July 31, 1909, W. T. Bower commenced an action to quiet title to the land in question. The complaint named W. H. Pound as one of the defendants. It appears to be assumed, on both sides, that on November 12, 1909, the plaintiff obtained a decree quieting his title to the lot as against all of the defendants, named in the complaint, other than W. H. Pound.

In the above mentioned action to quiet title, the defendant Pound, on September 17, 1909, filed a cross-complaint. In this was set up the contract hereinbefore quoted, and a specific performance of the same was prayed. It was also alleged that plaintiff's title was not perfect; that the plaintiff brought the action for the purpose of making the title perfect, and that the defendant Pound is willing to accept the title when it is made perfect by this action. The answer and cross-complaint further alleged the removal by plaintiff of certain improvements upon the lot, and sought a deduction from the purchase price by reason thereof.

On November 12, 1909, the plaintiff filed a reply to the answer and cross-complaint, admitting the execution of the contract, but denying other allegations.

At the time that the case was disposed of as to other defendants, on November 12, 1909, nothing was done as to the determination of the issues between the plaintiff and the defendant Pound. The cause was retired from the docket. In 1919, the case was re-docketed, on motion of the defendant Pound. Thereafter, and on June 5, 1919, the plaintiff filed a further pleading, in which he set up the defense of laches to Pound's cross-complaint for specific performance.

On July 10, 1919, upon trial to the court, a decree was rendered in favor of the defendant Pound, granting specific performance as prayed for in his cross-complaint. The plaintiff brings the cause here for review.

The principal contention of the plaintiff in error, plaintiff below, is that the record shows such laches on the part of the defendant Pound as precludes him from the right to the remedy of specific performance, which he seeks in his cross-complaint.

While the defendant Pound filed his cross-complaint in apt time, yet after the case was retired from the docket, he allowed the suit to remain in abeyance, and did not move to re-docket the same, for a period of over nine years, which was over eleven years after the contract was made. Laches may consist in a failure to prosecute with diligence the suit for specific performance, although the suit may have been seasonably begun. 36 Cyc. 724; *Grant v. Elder*, 64 Colo. 104, 170 Pac. 198, 205; *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100; *Johnston v. Standard Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480.

It was shown at the trial, by a clear preponderance of the evidence, that the property greatly increased in value during the time the defendant Pound, the purchaser, delayed in prosecuting his cross-complaint. There was testimony that the lot more than doubled in value. Such circumstances render the delay prejudicial to the vendor, and fatal to the purchaser's suit for specific performance. 36 Cyc. 726.

It is undisputed that during Pound's delay, the vendor, Bower, placed improvements on the lot. Bower testified that he expended \$800 upon the premises. It was evidently done, as he testified, in reliance on Pound's supposed abandonment of the contract. These are further circumstances tending to prove Bower's charge of laches against Pound. 36 Cyc. 725.

The record shows no circumstances sufficient to excuse Pound's laches. The vendor, Bower, remained in the pos-

session of the property. He did nothing recognizing the contract as still subsisting.

The record clearly shows such a delay, and such circumstances attending the same, as is fatal to Pound's claim to the right to specific performance. It is within the power of a court, upon review, to dismiss a suit for specific performance upon the ground of laches. *Hughes v. Leonard*, 66 Colo. 500, 181 Pac. 200. For the reasons hereinabove indicated, we are of the opinion that the defendant Pound's cross-complaint should be dismissed.

Other questions are presented in the briefs, but our determination of the same does not, or would not affect the result, and no opinion need be expressed thereon. The judgment is reversed and the cause remanded with directions to dismiss the cross-complaint.

Reversed and remanded.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9721.

SMILLIE v. MENDOZA.

1. PRACTICE IN ERROR—*Conflicting Evidence*. Verdict upon will not be disturbed.
2. PROMISE TO MARRY—*Breach—Evidence*. Action for breach of promise to marry; promise denied. The acts of the parties from which an inference as to their relations may be drawn, are admissible. Letters between the parties bearing upon the question are admissible.
3. —*False Defamation of Plaintiff*, the charges not being made in good faith, may aggravate the damages.
4. —*Damages—Excessive*. The courts are very unwilling to set aside a verdict in this class of cases as excessive.
5. —*Evidence—Objections to*, by counsel of the party who is testifying in his own behalf, and upon his own motion, present no question for review.

6. — *Wealth of Defendant*, is relevant and may be shown by any competent evidence.
7. — *Plaintiff's Character*, may be shown, where defendant has assailed it.
8. EVIDENCE—*Competency*. Plaintiff was asked the meaning of statements contained in letters written by her. No reason for the examination being given the exclusion of the evidence was held not an abuse of discretion.

Error to Weld District Court, Hon. George H. Bradfield, Judge.

Mr. JAMES W. GAULT, for plaintiff in error.

Mr. WALTER E. BLISS, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error had judgment against plaintiff in error in an action for breach of promise to marry, and the latter brings error.

The first assigned error which is argued is that the verdict is not supported by the evidence. Plaintiff testified that she and defendant agreed to marry; he says they discussed it but never entered into a contract to marry. There are many letters in evidence, written by the parties from which the jury might well conclude that plaintiff's testimony was more credible than that of defendant. The verdict was rendered on a conflict of evidence, and will not be disturbed.

It is urged, also, that the letters above mentioned were not admissible, and that doubtless they influenced the findings of the jury in favor of the plaintiff. The fact that marriage contracts are generally oral, and made without witnesses, has long been recognized by the courts, and the rule is well settled that evidence of the acts of the parties from which an inference may be fairly drawn as to their relations is admissible in suits of this kind. *Leckey v. Bloser*, 24 Pa. St. 401; *Rime v. Rater*, 108 Iowa 61; *Crosier v. Craig*, 54 N. Y. Supreme 83 (47 Hun.); *Vaughan v. Smith*, 177 Ind. 111; Elliott on Evidence, Sec. 1869.

Certainly correspondence between the parties about the time of the alleged engagement may contain matters from which an inference might be drawn as to the alleged contract. Such letters have been held admissible in several cases. *Geiger v. Payne*, 102 Iowa 581; *Richmond v. Roberts*, 98 Ill. 472; *Tefft v. Marsh*, 1 W. Va. 38. The letters in this case came clearly within the rule, as tending to throw light upon the issue of promise or no promise, and there was no error in their admission.

The judgment is attacked on the ground that it is based upon what is known as "a quotient verdict." On the hearing of the motion for a new trial, the court had before it affidavits of five of the six jurors on the question of how they reached their verdict, and denied a new trial. That was a finding against the defendant's contention which we cannot say was not justified by the evidence presented on that point. We are, therefore, bound by such finding. *Florence & C. C. R. R. Co. v. Kerr*, 59 Colo. 539. The same may be said of the charge that the jury was influenced by remarks of persons attending the trial.

It is urged that the verdict, \$7,500.00 is the result of passion and prejudice on the part of the jury, for which reason the judgment ought not to stand. The defense was a denial of the promise, and a charge that the plaintiff was "unchaste, lewd and immodest," at the time of the alleged making of the promise. The court instructed the jury that if they found said charge was not made in good faith and had not been proved, they might consider such attack on plaintiff's character in assessing her damages. The instruction was correct. *Fleetford v. Barnett*, 11 Colo. App. 77. We are not at liberty, therefore, to consider the verdict with reference only to what might be considered fair compensatory damages on the evidence. The amount of damages to be allowed in an action of this kind is a question peculiarly within the power of the jury, and courts are very unwilling to set aside a verdict on the ground that it is excessive. *Richmond v. Roberts*, *supra*; 9 C. J. 382. In *Salchert v. Reinig*, 135 Wis. 194,

the court said: "The translation into terms of money of those peculiarly indefinite damages which result from a breach of such a contract is so a matter of estimate that courts of appeal are extremely reluctant to interfere with the conclusion of the jury thereon." We find nothing to indicate that the verdict was due to passion or prejudice on the part of the jury.

Error is alleged also in the admission of testimony as to the details of defendant's property holdings. The objection is, that in admitting evidence as to defendant's property, the court violated the rule which prohibits, as counsel says, "specific evidence as to the value of particular pieces of property." The record does not show that such rule, if it exists, was violated, nor does it appear that counsel who tried the case for defendant made the objection now made by counsel. The question propounded to defendant was, "How much property did you own on June 1st or 2nd, 1917?" Counsel for defendant objected "as incompetent and immaterial in this case." Plaintiff's attorney then stated to the court that the evidence was offered "for the purpose of enlightening the jury as to the standing this plaintiff would have had in the community where she would have resided if the marriage had taken place, and also to inform the jury of the financial advantage to her the marriage would have caused and for the general information of the jury." In answer to the above question defendant stated that he sold a piece of property, describing it, and was then asked for how much he sold it. His counsel then stated that he wanted his objection to go to all these questions and said "he is going into specific questions now, he is specifying certain pieces of property and going into detail." That objection applied in fact to the answers made by defendant and not to the questions. It was made after the former objection had been overruled and when there was, as the court stated, nothing before the court.

In objecting to the next question, counsel said that he wanted it noted that his objections went to all the ques-

tions and answers on the ground that they are incompetent, irrelevant and immaterial and for the further reasons that they are hearsay "and the other reasons I have heretofore stated." The abstract then gives in narrative form the testimony of defendant as to property holdings, his disposition of the same, the amount received and the debts he paid. At the close of that testimony upon that point, defendant's counsel again stated that he objected to all questions and answers in regard to real property and to the entire line of cross examination. Nowhere did he call to the court's attention the rule, for which present counsel contend, that the evidence must be confined to general reputation as to material wealth. The objection was clearly not to the mode of proof, but to the admissibility of evidence as to plaintiff's wealth.

However that may be, we do not agree with counsel that the rule which he invokes is sustained by the weight of authority. In *Birum v. Johnson*, 87 Minn. 362, the court affirmed a judgment where evidence as to actual wealth as well as reputation as to it was received, over objections. The court seems to regard the admission of evidence of reputation as to wealth as permitted because of the difficulty of showing actual wealth. The rule is that a fact should be proved by the best obtainable evidence; why, then is it not competent to prove one's wealth by his own testimony as to his holdings, rather than on reputation which may be wide of the mark? Upon that reasoning the court in *Crosier v. Craig*, *supra*, affirmed a judgment in a case where it was assigned as error that two witnesses had been allowed to testify as to the actual value of defendant's lands. The court said that inasmuch as the defendant might show the actual value of his property as against evidence of his reputed worth, it was competent to show such value in the first instance. It is there pointed out that in *Kniffen v. McConnell* 30 N. Y. 285, a case relied upon by plaintiff in error, the objection was to any evidence as to defendant's wealth, and not to the mode of proof. The statement by the court that evidence

should be confined to general reputation was mere *dictum*. That it was so regarded by the Court of Appeals is shown by the fact that it affirmed *Crosier v. Craig*, in 130 N. Y. 661. In *Rime v. Rater*, *supra*, evidence as to the earnings of defendant was held admissible.

In *Vierling v. Binder*, 113 Iowa 337, the court says it is common practice to allow specific evidence as to defendant's pecuniary circumstances. See to the same effect *Vaughan v. Smith*, *supra*; *Hanson v. Johnson*, 141 Wis. 550; *Clark v. Hodges*, 65 Vt. 273; Elliott on Evidence, Sec. 1888; Vol. 2, Encyc. of Evidence, p. 749. It is well settled that, in this class of cases, the financial condition of the defendant may be shown; for obviously his pecuniary circumstances, as well as his social position, would influence any one's estimate of the damages suffered. That being true, there is no apparent reason why any competent evidence to show what his pecuniary circumstances are would not be admissible.

Counsel urge that the jury might measure the damages by the proved financial worth of the defendant. Inasmuch, however, as it is everywhere held that the evidence as to defendant's pecuniary circumstances is admitted, as bearing upon the question of damages, the objection seems to be not well founded.

It is further urged that the court erred in admitting evidence of plaintiff's good character. The authorities cited hold only that a charge of specific acts of unchastity may not be met by evidence of good character. Here, however, the answer contained an attack upon the plaintiff's character, as had already been stated, and defendant, in support of that allegation, testified to a situation from which unchastity would be inferred. Moreover, defendant testified to other matters tending to show that plaintiff was keeping a house of assignation. To meet that testimony evidence of plaintiff's good reputation was certainly competent. In *McKane v. Howard*, 202 N. Y. 181, a breach of promise case, the complaint alleged specific acts from which the conclusion of bad character in-

evitably followed. The defendant's evidence was in support of those allegations, and not to prove a general bad character. The court held evidence of good character admissible. On principle and authority we hold that there was no error in the admission of the evidence of character.

It is contended, also, that the court erred in sustaining objections to defendant's cross examination of plaintiff on her letters which were in evidence. The questions were directed to the meaning of certain statements in the letters. They were not intended to clear up ambiguities, and since no reason is given for them, we cannot say that the court abused its discretion in excluding them.

Objection is made to an instruction which told the jury that they might consider the letters in evidence in determining whether or not there was an express promise to marry. Letters, otherwise competent, are admitted for the purpose stated in the instruction. It did not emphasize the importance of the letters, and the objection to it is without weight.

Finding no error in the record, the judgment is affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9751.

INDUSTRIAL COMMISSION OF COLORADO v. FUNK.

1. WORKMAN'S COMPENSATION—*Disobedience of Orders or Rules—Effect.* The transgression of an order or prohibition which deals only with the workman's conduct within the sphere of his employment will not prevent the recovery of compensation.

Otherwise where the workman disobeys a rule or order which limits the sphere of employment.

The workman was directed not to work under an overhanging bank without first caving it down. *Held* the order was one only dealing with the workman's conduct within the sphere of his employment.

2. — *Violation of a Rule Prescribed for the Workman's Safety*, has the effect to reduce the compensation 50 per cent.
3. — *Casual Employment*. That the servant is not employed for any specified time does not render his employment casual under sec. 4 (d) II of the Workmen's Compensation Act (Laws 1915, c. 179).

A workman mining silica for use in the manufacture of brick at the works of his employer, and working with regularity. *Held* not a casual employee.

So that the injury occurs shortly after the employee begins work.

4. — *Number of Employees—Statute Construed*. That less than four men are employed in extracting silica for use in a brick yard conducted by their employer, where there are many employees, does not bring the case within sec. 4 (d) III of the act.

The manufacture and procuring the material for it constitute but one business.

Error to the Yuma District Court, Hon. L. C. Stephenson, Judge.

Hon. VICTOR E. KEYES, Attorney General; Mr. JOHN S. FINE, Assistant; Mr. H. E. CURRAN, for plaintiffs in error.

Mr. M. M. BULKELEY, Mr. WAYNE C. WILLIAMS for defendant in error.

Mr. Justice Allen delivered the opinion of the Court.

THIS cause is one brought and prosecuted under the provisions of the Workmen's Compensation Act. On June 14, 1916, Sam Gaines and William Gaines, father and son, respectively, were, as the result of an accident, killed while in the employ of Martin D. Funk, doing business as The Wray Brick Company. On August 26, 1918, the Industrial Commission, after due proceedings and a hearing, awarded certain compensation to one Fannie Gaines, the widow of Sam Gaines, deceased, as his dependent during his life time. Thereafter Martin D. Funk, the employer and who had been ordered to pay such compensation, filed a petition for rehearing, and the same was, on September 30, 1918, denied by the Commission. On November 18,

1918, Funk commenced an action in the District Court of Yuma County to set aside the order and award of the Commission, and on November 5, 1919 the District Court set aside the order and award. The Industrial Commission, and Fannie Gaines, as claimant of compensation, bring the cause here for review.

The record presents three main questions of law for our determination, namely:

1. Did the accident, which caused the death of Sam Gaines and William Gaines, arise out of and in the course of the employment of the decedents?

2. Was Sam Gaines, at the time of the accident, an employee, within the meaning of the Workmen's Compensation Act, who or whose dependents would be entitled to compensation under the Act?

3. Was Martin D. Funk such an employer as to be or to become subject to the provisions of the Workmen's Compensation Act?

It is plain from the provisions of the Workmen's Compensation Act, and it is not controverted, that if any one or more of the foregoing questions must be answered in the negative, no compensation was allowable to any one, and the order and award of the Commission cannot be upheld. The District Court set aside the order and award on grounds which are the equivalent of answering the first two questions in the negative.

Relevant to the first question, the findings of the Commission, which are supported by the evidence, are as follows: "That at the date of their death, they (Sam Gaines and William Gaines) were employed by the said Martin D. Funk, doing business as The Wray Brick Company, in mining silica from an open pit or bank then owned and operated by the said Martin D. Funk in connection with his brick business in the City of Wray, Colorado. That while so employed and engaged in mining silica under the bank, the top caved off, completely covering the said William and Sam Gaines and causing almost instant death.

* * * That from the evidence produced at said hear-

ing the Commission finds that the said Sam Gaines was guilty of violating a reasonable safety rule, in this: That the said Martin D. Funk has specifically ordered and directed that the said Sam and William Gaines were not to work under the overhanging silica bank without first causing the same to be caved off. That the said Sam and William Gaines had not caved off the top of the silica bank as directed and that in accordance with the Workmen's Compensation Law, compensation or death benefits should therefore be reduced 50%."

Whether it is to be held that the accident arose out of and in the course of the employment, depends upon the consequences which we find result from the disobedience of the order or direction, mentioned in the findings. In 1 Honnold on Workmen's Compensation, p. 390, sec. 113, the author says: "Disobedience to an order or breach of a rule is not of itself sufficient to disentitle a workman to compensation, so long as he does not go outside the sphere of his employment. There are prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within such sphere. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." In the instant case, it should be noted that the Commission found that the workman was directed "not to work under the overhanging silica bank without first causing the same to be caved off." It is thus seen that the workman was not prohibited from working at all on the silica bank in question, but was instructed to cave off the top before commencing the work of mining at that particular place. The order related to the manner in which that particular section of the silica bank was to be worked. The order, therefore, dealt only with the conduct of the workman within his sphere of employment, and did not limit such sphere. Under the rule above quoted from Honnold, which we regard as

correct, the violation of the order or direction involved in this case, did not make the accident one *not* arising out of and in the course of the employment, and it cannot, therefore, be held that the deceased were not within the scope of their employment at the time of the accident.

The Commission regarded the disobedience of the order as a violation of "a reasonable safety rule," and for that reason reduced the compensation 50%, under section 61 of the Workmen's Compensation Act of 1915, which provides for such action "where injury results from the employee's wilful failure to obey any reasonable rule adopted by the employer for the safety of the employee." We agree with the commission's conclusion that the order in question was a safety rule, within the meaning of the Act. With reference to the direction, the employer testified: "I told them that the bank was safe here and here (pointing) and here not to take any more out unless he caved it down from the top; while it might stand if left alone, if they dug any further, it might cave on them." It is also plain from the section last cited (Sec. 61, chapter 10, 179 S. L. 1915) that a wilful violation of a safety rule does not defeat compensation, but only reduces it fifty per cent.

The defendant in error, the employer and respondent in the proceedings before the Commission, contends, with reference to the second question presented in this case, that Sam Gaines was not such an employee as would be entitled to compensation under the Act, or whose dependents would be so entitled. In this connection it is insisted that William and Sam Gaines were "casual" employees, and reliance is placed upon Section 4 (e) II of the Act, where it is provided that the term "employee" shall not include "any person whose employment is but casual."

The evidence shows that the employer was in the business of manufacturing brick. The silica bed upon which the employees worked was operated in connection with such business, and for the purpose, at least among others, of furnishing material used in the manufacture of brick. The work of Sam and William Gaines, performed at the

silica mine, was therefore in the usual course of the business of the employer. Such service was not merely incidental to the business, nor occasional. The mining of silica was carried on continuously, or at least with regularity. The employees at the mine were employed to do a particular part of a service recurring somewhat regularly, with the fair expectation of the continuance for a reasonable time. It does not render an employment casual that it is not for any specified length of time, or that the injury occurs shortly after the employee begins work. Under the facts above stated, and the principles announced, we conclude that Sam and William Gaines were not casual employees, within the meaning of the statute. Sec. 1 Honnold on Workmen's Compensation, section 62, pp. 199 et seq., and cases cited in the notes; also section 43, p. 51, Corpus Juris treatise on Workmen's Compensation Acts, and notes.

As to the third main question, hereinbefore referred to in this opinion, the contention of the employer, defendant in error here, is to the effect that he, Martin D. Funk, was not, at the time of the accident, such an employer as is subject, without his election, to the provisions of the Workmen's Compensation Act. In this connection, defendant in error relies upon section 4 (d) III of the Act, which reads as follows: "III. This act is not intended to apply to employers of private, domestic servants or farm or ranch labor; nor to employers who employ less than four employees regularly in the same business, or in or about the same place of employment; *Provided*, That any such employer may elect to accept the provisions of this act, in the manner provided herein, in which event he and his employees shall be subject to and entitled to all the provisions of this act." The particular part of this section upon which the defendant in error specially relies, is the expression, "in or about the same place of employment," and it is argued that the employer in the instant case is not subject to the act, because less than four persons were engaged in performing services at the pit or

bank of silica, where Sam and William Gaines were working; in other words, it is contended that the act does not apply to the defendant in error simply because he employed less than four persons at the particular place of employment where the accident occurred.

Under the construction which the defendant in error apparently places upon the Workmen's Compensation Act, and particularly section 4 (d) III thereof, an employer would be subject to the act only as to those employees who work at a place where four or more persons are working under employment, and would not be subject to the provisions of the act as to those employees who perform services at some particular place, appurtenant to the employer's business, at which less than four persons are working. Such a construction of the statute cannot be upheld. It readily appears from other sections of the act, that if an employer is subject to its provisions, he is subject as to all employees engaged in a common employment, even if a particular group of less than four of them are performing services at some one place. It may be that section 4 (d) III, considered literally, to some extent supports the contention of the defendant in error, but, if so, it is inconsistent with other sections of the act. In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent. 36 Cyc. 1130.

The intent of the legislature as to who shall be deemed to be employers, subject to the provisions of the Act or within the meaning of the Act, is expressed in section 4 (d) II, where it is provided that: "The term 'employer' shall mean and include. II. Every person, association of persons, firm and private corporation (including any public service corporation), * * * who has four (4) or more persons regularly engaged in the same business or employment, (except as otherwise expressly provided in this act.)" Subdivision III of this section, which is relied on by the defendant in error, does not say who shall be deemed to be employers, but rather who shall not, and its

main purpose is to provide that the act shall not apply to employers of private, domestic servants or farm and ranch labor, unless such employers elect to accept the provisions of the act.

That the intent of the legislature was to bring under the act those employers who have four or more persons regularly engaged in the "same business or employment," as provided in section 4 (d) II, instead of limiting the application of the act to those having such number of persons "in or about the same place of employment," according to the expression used in section 4 (d) III, is also indicated by the language employed in section 9, subdivision II, which reads, in part, as follows: (*italics ours*): "II. On and after August 1, 1915, every employer of four or more employees, not including private domestic servants and farm and ranch laborers, *engaged in a common employment*, shall be conclusively presumed to have accepted the provisions of this act. * * * Any employer commencing business subsequent to August 1, 1915, may make his election not to become subject to the provisions of this act at any time prior to becoming an employer of four or more employees, *in a common employment*. * * *

Considering together the various sections and subsections above referred to, they must be held to provide that an employer is subject to the provisions of the act, without his election, if he employ four or more persons in the same business, or if he is an employer of "four or more employees engaged in a common employment."

It seems clear that the manufacture of brick, in the sense that material is made into brick, and the procuring of material to be used in such manufacture, together constitute but one business or employment.

The Commission found, and the evidence supports the finding, that the silica mine was operated by Funk "in connection with his brick business in the City of Wray." The evidence shows that the employer operated a brick manufacturing plant and brick yard in Wray, and that about 20% of the volume of material mined from the silica

bed or bank operated by Funk, and at which Sam and William Gaines were working, was used by him in the manufacture of brick at such plant or yard. The evidence shows, and it is not disputed, that more than four persons were employed by Funk in his business which involved the manufacture of brick and the mining of silica used in such manufacture. Those who were mining silica and those working in the brick yard at Wray, were each and all together engaged in a common employment, within the meaning of the expression "common employment," as used in the Workmen's Compensation Act. The reason is that the purpose of the work of each was a common one; they were working to accomplish the same general end, the manufacture of brick. See definitions of "Common Employment" in 1 Words and Phrases (2nd series), 808.

Under the views expressed in this opinion, there is no ground shown in the record upon which the order and award of the Commission should be set aside. For the reasons above indicated, the judgment of the District Court is reversed and the cause is remanded with directions to affirm the order and award of the Industrial Commission.

En banc.

Reversed.

Mr. Justice Denison and Mr. Justice Burke dissent.

No. 9786.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v.
PUBLIC UTILITIES COMMISSION ET AL.

1. POLICE POWER—*Unreasonable Order*, made by a Public Commission is void.
2. —*Presumption*. Orders of a railway commission are presumptively reasonable and will not be overturned unless the contrary clearly appears.
3. —*Order to Railway Company to Establish a New Station*, sustained.

That the railway was subject to federal control under the act of March 21, 1918, was held, in view of sec. 15 of the act, and a general order of the Director General of Railways, not to invalidate the order.

An order of a federal official limiting the expense of any improvement, *Held* not to refer to expenditures made under police regulations of the state.

Writ of Review to the Public Utilities Commission.

Mr. S. HARRISON WHITE, Mr. E. E. WHITTED, Mr. J. L. RICE, for petitioner.

Mr. FRANK McLAUGHLIN, for respondents.

Mr. Justice Allen delivered the opinion of the court.

THIS cause is before us on a writ of review to determine the validity of an order of the Public Utilities Commission requiring the Chicago, Burlington & Quincy Railroad Company to erect and maintain a station, with an industrial track, at a point on its line of railroad in Weld County.

The Railroad Company complains of the order, contending that it is unreasonable and unjust. Orders of a commission which require the erection and maintenance of stations at specified places are regulations made under the police power. 12 C. J. 1268, 1269. The regulations are void if unjust and unreasonable.

Orders of a railroad commission are presumptively reasonable, and will not be overturned unless it clearly appears that they are unjust and unreasonable. 22 R. C. L. 784, sec. 39. Our duty is to examine the testimony in order to determine whether there is competent testimony to support the findings of the commission, and whether the commission's order is just and reasonable. *Chicago, R. I. & P. Ry. Co. v. Pub. Utilities Com.*, 64 Colo. 263, 171 Pac. 86.

The proposed new station is referred to in the briefs as "Omar." If established, it would be located 57 miles east of Denver, between the stations of Roggen and Wiggins. Roggen is 11 miles west of the proposed station,

and Wiggins lies five miles east. Crest is a small station six miles east of Roggen. A siding, known as Bronco, is located about two miles east of the proposed station.

The station at Crest and the siding of Bronco are 6.34 miles apart, and the location of the proposed new station lies between these two points. It appears from the findings of the Commission that its principal reason for ordering the establishment of the new station is that farmers in the surrounding country "cannot go into or out of Crest or Bronco on account of sand," and "that the present facilities at Crest and Bronco are nearly inaccessible" on account of sand hills at those places. The Commission in its findings stated that it "will consider the closing of the station at Crest permanently or making it a non-agency station, on application by" the railroad company. The order reads, in part, as follows: "It is therefore ordered, That the defendant (the railroad company), on or before 90 days from the date of this order, erect a suitable station building, install an agent therein, maintain an agency station, and construct an industrial track not less than 1,000 feet long and stock yards facilities usual at such stations at a point on defendant's line near the center of Section 25, Town 2, Range 61, Weld County, Colorado, at Mile Post 484, with leave to remove the present industrial track at Bronco. * * *" From the foregoing order, it appears that the siding at Bronco may be abolished and the industrial track or switch at that point may be removed by the railroad company.

Upon a review of the record, we conclude that there is sufficient evidence to support the findings of the Commission; that the Commission's conclusions are in accordance with the evidence; and that the order is just and reasonable. It is assumed, in connection with the expression of this opinion, that the Commission will, as stated in its findings, "consider the closing of the station at Crest," and that upon application by the railroad company it will close such station permanently or make it a non-agency station.

The only remaining question in this case is whether the Commission had jurisdiction to make the order complained of, in view of the fact, of which this court takes judicial notice, that at the time the order was made, namely September 24, 1919, the railroad was subject to the Federal Control Act, being the Act of Congress of March 21, 1918 (Section 10156, et seq. Barnes Federal Code, 1919).

As hereinbefore stated, the order of the Commission requiring the new station at Omar, was a police regulation. It is not disputed that the Federal Control Act did not affect the laws or the powers of the states respecting railroads, where not inconsistent with the provisions of the Federal Act. Section 15 of the Act reads as follows: "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." Consistent with this section, the President through the Director General of Railroads, promulgated General Order No. 58, dated February 20, 1919, which, in part, reads as follows: "Transportation systems under federal control continue subject to the lawful police regulation of the several states, which were and are applicable to privately operated transportation systems in such matters as spur tracks, railroad crossings, safety appliances, track connections, train service, establishment, maintenance and sanitation of station facilities, investigation of accidents, and all other matters of local service, safety and equipment. It will be the policy of the Director General to cause the orders of the state commissions in these matters to be carried out." The foregoing General Order and the above quoted section 15 of the Federal Control Act, taken by themselves, clearly sustain the Public Utilities Commission in assuming jurisdiction to make the order involved in this case. In the case of *Commercial Club of St. James v. Chicago, etc., Ry. Co.* (Minn.), 171 N. W. 312, it

appears that the State Railroad and Warehouse Commission of Minnesota made an order directing the railroad company to erect a new railroad and passenger depot at St. James, Minn. Referring to the Federal Control Act, the court in that case said: "Under General Order No. 58 of the Director General of Railroads, dated February 20, 1919, it is plain that Act Cong. March 21, 1918, c. 25 (U. S. Comp. St. 1918, secs. 3115 $\frac{1}{2}$ a to 3115 $\frac{1}{2}$ p), has no bearing upon the present controversy."

The Railroad Company in the instant case, however, contends that the Commission was deprived of jurisdiction to make an order establishing a railroad station which would cost more than \$1,000. This contention is made in reliance upon a promulgation of the Director General of Railroads made at a time later than when General Order No. 58 was issued. In other words, the reliance is placed upon an order known as Supplement No. 2 to General Order No. 12, which amends Supplement No. 1 to such order No. 12. Supplement No. 1 was issued November 12, 1918, several months prior to the time that General Order No. 58 was made, and provided that "no work involving a charge to capital account in excess of \$10,000 shall be contracted for or commenced unless it be authorized by the Director of the Division of Capital Expenditures," except in certain cases. Supplement No. 2, on which the Railroad Company relies, does not purport to modify General Order No. 58, but merely substitutes the figure 1,000 for the number 10,000 which appeared in Supplement No. 1, so far as these two Supplements are material to the present discussion. The pertinent part of Supplement No. 2 reads as follows: "General Order No. 12 and Supplement Number 1 thereto are hereby amended to provide so that no work involving a charge to capital account in excess of \$1,000 (instead of \$10,000) shall be contracted for or commenced unless it be specifically authorized by the Division of Capital Expenditures." We find nothing in either Supplement No. 1 or Supplement No. 2 which purports, or is intended, to limit the police powers of the

states. These two orders do not refer to expenditures made in compliance with police regulations. They do not affect General Order No. 58, which plainly authorizes the order made in the instant case, according to the view we have previously expressed and according to the holding in *Commercial Club of St. James v. Chicago, etc., Ry. Co., supra*. We therefore agree with the conclusion reached by the Public Utilities Commission, with reference to the contention now under consideration. In its decision on a petition for rehearing in this case, the Commission stated: "The Commission is of the opinion that such Supplement (No. 2) does not constitute a limitation of its authority and is solely directed to the relations between operative officers and directing heads of the Railroad Administration; and that General Order No. 58 of the Director General was not modified thereby." For the reasons above indicated, we cannot sustain the contention that the Commission acted without jurisdiction.

The order and decision of the Commission is affirmed.

Affirmed.

Decision *en banc*.

Mr. Justice Bailey not participating.

No. 9792.

KEITH v. SCHUCK.

1. PRACTICE IN ERROR—*Harmless Error*. Complaint containing two causes of action alleged to be inconsistent. Demurrer for misjoinder, and motion to compel an election denied; but the court limited plaintiff's recovery to what was demanded in one of the counts. *Held* to render the error harmless.
- A decree appropriate to a suit in equity after judgment at law was held no reason to remand the cause.
2. EQUITY—*Rescission of Contract—Return of Things Purchased*. Machinery purchased by plaintiff in reliance upon false representations of defendant. Offer to return refused. In fact the machinery was under chattel mortgage executed by plaintiff,

at the time of the refusal, but was not assigned as the ground of the refusal by the defendant. A release of the mortgage produced at the trial was held to render harmless any rulings of the court as to the effect of the mortgage.

Error to Jefferson District Court, Hon. S. W. Johnson, Judge.

Messrs. DANA, BLOUNT & SILVERSTEIN, for plaintiff in error.

Messrs. QUAINANCE, KING & QUAINANCE, and Mr. GEORGE J. HUMBERT, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is an action by the buyer against the seller of certain personal property. The plaintiff seeks to recover back the purchase money, on the theory that he had rescinded the contract of sale on the ground of fraud. The complaint also contains a cause of action for damages. The plaintiff was successful in the court below as to the recovery of the purchase money, and makes no complaint here of the failure to recover upon his claim for damages. The defendant brings the cause here for review, and has applied for a supersedeas.

The plaintiff in error, defendant below, contends that there is a misjoinder of causes of action in the complaint.

The complaint, as amended, for a first cause of action alleges, in substance, that on or about October 8, 1918, Charles F. Schuck, the plaintiff, purchased from the defendant, C. W. Keith, "one B. F. Avery Tractor or Motor, together with two disc and two Mold Board Plows and the fixtures and equipment going with the same, for the purchase price of \$1,410.00"; that the purchase of the property was induced by certain false representations made by the defendant; that upon the discovery of the falsity of the representations, the plaintiff immediately elected to rescind the sale, notified the defendant to that effect, and tendered and delivered the property back to the defendant. It is conceded, or at least we find, that the first

cause of action is one for the recovery back of the purchase money on the theory that the plaintiff had rescinded the contract on the ground of fraud.

The second cause of action sets up the fraud alleged in the first cause of action, and alleges, in substance, that because of such fraud the plaintiff was unable to plow certain lands which, in reliance upon defendant's alleged representations, he had contracted to plow. Damages are claimed on this account.

The defendant's contention, above mentioned, that there is a misjoinder of causes of action, is based upon the theory that the second cause of action is one which affirms the contract, and therefore inconsistent with the first cause of action. The plaintiff, on the other hand, contends that the second cause of action disaffirms the contract, and that the damages sought to be recovered are merely incident to the first cause of action.

To raise the question of misjoinder of causes of action, the defendant filed a demurrer to plaintiff's replication, on the theory that the demurrer would be carried back to the complaint. The demurrer was overruled. The question of misjoinder was again presented by a motion to compel the plaintiff to elect upon which cause of action he would proceed. The motion was denied.

Error is assigned to the overruling of the demurrer and the motion. Assuming, without conceding or deciding, that the defendant's contention as to misjoinder of causes of action is well founded, and that the court erred in overruling the demurrer, and again erred in denying the motion to compel election, the record shows that such errors were harmless. The conclusion just stated results from the fact that the trial court in its instructions to the jury limited plaintiff's recovery, if any there should be, to that sought only in the first cause of action. Where a court limits recovery to one cause of action, a misjoinder of causes of action is not a ground for reversal. 4 C. J. 928, sec. 2902. The overruling of a demurrer for misjoinder of causes of action is harmless error where only one cause of action is

submitted to the jury. 4 C. J. 935, sec. 2909. Where the court, after hearing the evidence, eliminates one of the causes of action, rulings refusing to compel an election do not constitute prejudicial error. 4 C. J. 943, sec. 2918.

The plaintiff in error further contends that the plaintiff below "was unable to put the defendant in *statu quo*", and therefore could not rescind the contract and his only remedy, if any, was damages for breach of contract. This contention involves the facts relating to plaintiff's return of the property, and his compliance with the rule that a buyer must as a condition precedent to rescission restore or offer to restore the property to the seller.

It is admitted in the pleadings that "the plaintiff offered to deliver" to the defendant the property purchased, which is generally referred to in the briefs as the "tractor". The plaintiff in error, however, claims that the plaintiff could not, and did not, restore or offer to restore the consideration, because of the fact that he had placed a chattel mortgage upon the tractor, which mortgage was a valid and subsisting lien on the property at the time it was returned or offered to the defendant.

Whatever may ordinarily be the effect of placing a chattel mortgage upon property which is afterwards returned to the seller in an attempt by the buyer to rescind the sale, it does not warrant a reversal of the judgment in the instant case. It is not disputed that at the time the tractor was returned to the defendant, he refused to accept it. He did not refuse to receive the property upon the ground that a lien existed thereon. Had the refusal been made upon such ground, the plaintiff might have made his tender good by procuring and delivering to the defendant a release of the mortgage. 2 Black on Rescission, etc., sec. 620. The plaintiff did not, after the return of the tractor, treat it as his own. The defendant did, or at least could have, possession of the property. The mortgage was eventually released. At the time of the trial, the plaintiff introduced in evidence a release of the mortgage. If the rescission was faulty, which we do not concede, the

defendant was not prejudiced thereby. We are of the opinion that under the admitted facts, above mentioned, the defendant's substantial rights were not affected by any rulings at the trial with reference to the effect of the chattel mortgage.

The plaintiff in error complains of a decree which was entered by the court after a judgment in favor of the plaintiff upon the verdict was ordered entered. The decree appears to be one appropriate in a suit in equity to rescind. It purports to reinvest defendant with title to the property, and rescinds the contract of sale. If such a decree is improper, or even if it is void, merely because the action was one at law based on a rescission by the act of the plaintiff, it affords no reason for remanding the case, and plaintiff is still entitled to the judgment on the verdict for the sum of \$1,410.00, the purchase price of the tractor. The entry of the subsequent decree benefited defendant more than plaintiff, and if such entry was error, it is not an error of which defendant can complain.

Other questions are discussed in the briefs, upon which no opinion will be expressed other than to say that there is sufficient evidence to support the judgment and that there is no reversible error in the record.

The application for a supersedeas is denied. The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9826.

BENISH v. JONES.

1. PRACTICE IN ERROR—*Defense Not Pleaded*, is not noticed in the court of review.
2. GAMBLING—*Gaming Debt*, is a nullity, and a pledge of personal property to secure it is void.

3. INTERVENTION—*Burden of Proof.* One who intervenes in an action of replevin or claiming the goods, has the burden showing his title.
4. PLEADING—*General Denial*, to a petition in intervention claiming ownership entitles the defendant to the benefit of any evidence tending to contradict such claim.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Department Two.

Messrs. DEWEESE & MCPHAIL, for plaintiff in error.

Mr. CLIFFORD W. MILLS, for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

MARGARET S. JONES, Administratrix of the Estate of Allen E. Jones, brought suit in replevin against the Shirley Hotel Company to recover an automobile which she claimed had belonged to her intestate; Benish intervened, alleging that he was the owner of the car, that he bought it of Allen E. Jones, and paid for it and assumed charges against it of \$51.67.

To this the plaintiff filed a general denial. The plaintiff had a verdict. The intervenor brings error and moves for a supersedeas.

There was no error in denying the intervenor's motion for a directed verdict. There was conflicting evidence as to ownership, which was the only issue.

One Morton Jones, a witness for the plaintiff, was permitted to testify that Benish told him that he, Benish, held the automobile as security for a debt incurred in "a little game among friends." This evidence was competent to show that the transaction was a pledge and not a sale. The objection to it, therefore, that it referred to a matter not pleaded, was not sound.

The Colorado cases hold that after property sold for a gambling consideration has been delivered to the purchaser, the transaction will not be re-opened. But these cases are

not in point if the property is held as security for a gaming debt, because in such case the pledgee, to maintain his position, must show an existing, valid debt; but a gaming debt is void; so he cannot show a right of possession as security. Regardless of the question of gaming, however, the intervenor cannot rest his right of possession on a lien or pledge because he did not plead it, but rested his case upon a plea of ownership. *Gay v. Fretwell*, 9 Wisc. 186, 193, 194; *Mellott v. Downing*, 39 Ore. 218; 64 Pac. 393.

The court by instruction No. 3 told the jury that if the automobile was delivered to secure a debt any part of which was incurred in gambling, the verdict should be for the plaintiff. Intervenor excepted and claims that the fact of gambling should have been specially pleaded, if the plaintiff intended to rely on it. It follows, however, from what has already been said, that the instruction, even if erroneous, was harmless, because, if the car was held as security for a debt, the intervenor could not recover whether the debt was a gambling debt or not, since he had not so pleaded. We think, however, that the instruction was correct any way. Upon the issue of ownership the burden was upon the intervenor, and the plaintiff, under a general denial, was entitled to the benefit of any evidence that tended to show the intervenor did not own the car. *Payne v. Williams*, 62 Colo. 86, 160 Pac. 196; *Lavelle v. Julesburg*, 49 Colo. 290, 293, 112 Pac. 774; *Cordilla v. Pueblo*, 34 Colo. 296, 82 Pac. 594; *Alden v. Carpenter*, 7 Colo. 87, 91-3, 1 Pac. 904; *Mott v. Baxter*, 29 Colo. 420, 68 Pac. 220; *Saxonia Co. v. Cook*, 7 Colo. 569, 4 Pac. 1111.

If he held it as security for a gambling debt he did not own it. *Hurd v. Vincent*, 1 Tenn. 292; *Dodge v. McMahon*, 61 Minn. 175, 177, 63 N. W. 487.

The allegation of the intervenor that he had purchased and paid for the car was mere evidence tending to show him to be the owner. *Hanna v. Barker*, 6 Colo. 303, 313; *Cuenin v. Halbouer*, 32 Colo. 51; *Pike v. Sutton*, 21 Colo. 84.

Judgment should be affirmed.

Garrigues, C. J., and Scott, J., concur.

No. 8328.

MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY v.
THE PEOPLE EX REL.

1. QUO WARRANTO—*By Private Relator.* Under license from the city the defendant had, at great expense, constructed a line of telephone occupying with its structures the public streets. The city had accepted and was still accepting valuable services from defendant, and had taken no step to revoke the license. *Held* that a private citizen was not entitled to quo warranto to oust defendant of the franchise, especially as the municipality had the power of revocation, and the like power was vested in the inhabitants through the initiative.
2. SUPREME COURT—*Quorum.* A majority of the judges constitute the quorum of the court.
3. —*Majority of the Quorum.* The judges constituting a majority of the quorum may speak for the court in the decision of any case.

On the first question Garrigues, C. J., and Burke, J., concur, Allen, J. and Denison J. not sitting.

On the last question Garrigues, C. J., and Allen, Burke and Denison, J. J., concur; Scott and Teller, J. J., dissenting on both propositions.

Error to Denver District Court, Hon. John H. Denison, Judge.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, Mr. ELMER L. BROCK, Mr. JOSEPH SAMPSON and Mr. FLOYD F. WALPOLE, for plaintiff in error.

Mr. JOHN A. RUSH, District Attorney, Mr. WILLIAM E. FOLEY, District Attorney, Mr. WAYNE C. WILLIAMS and Mr. OMAR E. GARWOOD, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THE action is in *quo warranto*, brought by the People on relation of O. Clinton Wilson acting in a purely private capacity, having admittedly no interest other than such as is common to all taxpayers in the community, to oust the

defendant from an alleged exclusive franchise right or privilege to occupy the streets and alleys of the City and County of Denver for the purpose of giving telephone service. The complaint was amended by striking out the word "exclusive" before the words "public franchise right or privilege."

A demurrer to the amended complaint was interposed upon two grounds: (1) That the relator shows no right whatever to maintain the action, and (2) That the complaint as amended does not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendant answered.

To the answer the relator filed a replication, the first paragraph of which contained a general demurrer. The case was heard upon such demurrer. The defendant sought to have the demurrer carried back to the complaint as amended, but the court denied that request, and sustained the demurrer to the answer. Thereupon the defendant elected to stand by its pleadings and cause as made, and final judgment, not of ouster from the exercise of an exclusive privilege, but an absolute and unconditional ouster from the streets of the city was entered. On this record the defendant brings the case here for review. It will be observed, therefore, that the issues involved, to which the assignments of error are directed, are of law only.

The answer sets forth in addition to many other claims and defenses, certain specific matters, which tend to establish that the complaint fails to state facts sufficient to constitute a cause of action, that question having been raised, in the first instance, by demurrer to the complaint. Upon such demurrer it was argued that the right to maintain this action in any event, did not and could not exist until the duly constituted city authorities had taken appropriate action to terminate and revoke the license to the defendant to be in its streets and alleys, the existence of which license the complaint admits.

The facts thus stated in the answer, the truth of those which are material and well pleaded being admitted by the demurrer, are in substance: That since 1879 the defendant, and its predecessors in interest, have occupied the streets and alleys of the City of Denver, with its telephone lines and equipment, under the formal written permission, and by and with the consent of the duly constituted official authorities thereof, subject always to reasonable police control and proper general regulation. That under such license the defendant company, and its predecessors in interest, constructed its plant within the city limits, at a cost of approximately four millions of dollars, that such plant is a vital and integral part and parcel of an interstate system, extending into and throughout the States of Colorado, New Mexico, Idaho, Utah, Texas, Wyoming and Arizona, constructed at a cost of approximately thirty-six millions of dollars, and of that value, which, if this company is compelled to abandon its Denver connections, would not only be greatly damaged and impaired, but practically destroyed. That just presently before the commencement of this action the defendant had expended over a million dollars in placing underground within the city certain of its lines, under the supervision, upon the authority and by order of the city officials. That as a consideration for such license to so use its streets and alleys, the city had demanded, and at all times had received, for its public business and for the use of certain of its officers, partially free telephone service. That the city had permission, at all times and without charge, to string and operate its fire alarm and police wires upon the poles of the defendant, so erected in the city, has done so and still continues to do so. That there never has been an attempt in any way, or at all, by the duly constituted authorities, or by any one whomsoever, to annul, terminate, set aside, alter, withdraw or revoke such license, and that the same is now and at the time of the commencement of this suit was, and still continues to be in full force and effect, and is so recognized, acknowledged, acquiesced in and acted upon by the muni-

cipality, which is now receiving and accepting from the defendant telephonic service. That from time to time improvements upon, additions to and extensions of the plant of the defendant have been made with the consent and approval of the city, under its general regulation and police inspection. That the major portion of such improvements, additions and extensions, so as aforesaid made, have been so made within the twelve years next preceding the commencement of this action.

It is thus shown that the defendant had a license from the city to construct a telephone plant, which has been constructed, is being operated and public service being given. In view of the fact that there has been expended, in the construction, additions and extensions of the plant a vast sum of money, that the city has consented to such construction, additions and extensions, has permitted the operation of such plant, has accepted, and still is accepting, valuable considerations for extending such privileges, is still receiving service therefrom, and has taken no step to revoke the license under which the company operates, it would be illogical and unreasonable to hold that a private individual, with no interest other than such as is common to every taxpayer in the municipality, could, under such circumstances, maintain an action of absolute ouster against it. This becomes the more apparent when it is considered that the municipality, through its legislative authorities, has power to revoke licenses, and that a like power is vested in the people, as a whole, through the initiative to bring before the electorate ordinances revoking licenses, with full authority in the voters to give expression through the ballot, to their will on the subject.

By these acts of regulation, supervision and control through its proper officials the City and County of Denver has and does recognize the right of defendant to continue in its streets and in effect requires and demands such continuance.

Under the allegations of the answer, and there is no dispute as to the facts, it seems clear that the telephone

company, being in the streets by permission of those having power to extend such privilege, is not a trespasser, and that no action in *quo warranto* could, under such conditions, be maintained. Without regard to the duration or extent of the right of the telephone company to occupy the streets and alleys of Denver, which we neither consider nor determine, upon authority it is plain that it has such right, so long as the city, in the exercise of jurisdiction, accepts service from it, fails to revoke or attempt to revoke its right to be in its streets, and assumes generally to regulate and control its course of conduct.

In support of this proposition we direct attention to section 1315 of Volume 3, 5th edition of Dillon on Municipal Corporations, where that learned author said "If the city continues to accept a service of water or light from the company and regulates the rates therefor, this gives implied consent to the continued possession of the streets and operation of the works until such time as the city shall, by reasonable notice, see fit to determine the corporation's tenure of the privileges."

East Tennessee Telephone Company v. Board of Councilmen, 141 Ky. 588, 133 S. W. 564, is a case in which the Kentucky Court of Appeals expressly ruled that, although the company's right to be in the streets could be terminated, that the right, nevertheless, continues until duly withdrawn. At page 591 of that opinion, the court said: "The council has not yet revoked the permission, and until it is revoked the grantee is rightfully in possession."

The principle of these authorities was recognized by this court in *Denver Tramway Company v. Londoner*, 20 Colo. 150, and also in *Board of Public Works v. Denver Telephone Company*, 28 Colo. 401, 37 Pac. 723. The answer discloses that the city has accepted and continues to accept, service from the company, and has regulated its affairs in such a way as to bring the case definitely within the rule laid down by Dillon, *supra*, particularly since its right to be in the streets, as appears from such answer, has never been revoked. It is clear, therefore, that when

this suit was brought no cause of action for ouster had accrued in behalf of anyone, and that a judgment of dismissal, without prejudice, should have been rendered by the trial court.

If there has ever been any doubt as to the propriety and soundness of this proposition, it has been finally set at rest by two late decisions of the United States Supreme Court, one the *City and County of Denver v. Denver Union Water Company*, 246 U. S. 178, 62 L. Ed. 649, 38 Sup. Ct. 278, and the other *The Detroit United Railway v. City of Detroit*, 248 U. S. 429, 63 L. Ed. 341, 39 Sup. Ct. 151. In both cases it was conceded that all street rights had terminated, and that the municipalities in question were free to proceed with ouster suits against the respective utilities. Instead of doing this the municipalities undertook to still regulate the conduct of the business of these companies within their borders and by so doing, the United States Supreme Court, declared, made it lawful for the utilities to continue in the use and occupation of such streets and alleys. These decisions definitely support the contention that this action is premature.

In the *Denver Union Water Company* case, although the franchise term had expired, and although that fact had been judicially declared, thereafter the City and County of Denver enacted an ordinance regulatory of the rights and privileges of that company. At page 188 of the opinion, the effect of such an ordinance is discussed, in the following terms: "The practical situation existing at the time of its enactment (referring to the enactment of the regulatory ordinance) is sufficiently clear from what has been said. The answer admits the averment of the bill that complainant has been and is compelled to continue to serve the city and its inhabitants with water, because there is no other supply of water available, and a cessation of its service would result in great suffering, damage and loss of life. The city is located in a semi-arid region, and is and for nearly a half century has been, absolutely dependent upon the continued operation of complainant's system.

The termination of the legal franchise in 1910 did not absolve the city from its duty to the inhabitants. At the time of the enactment of the ordinance of 1914, the company's plant had been in use for four years since the expiration of the former franchise, * * *.

"It is in the light of all these circumstances that the provisions of the ordinance of 1914 must be read. There is a preamble reciting that since 1910 the company had been without franchise and a mere tenant by sufferance of the streets, and that, while it had been supplying the city and its inhabitants with water, it had done so 'at rates that are excessive and that should be reduced and regulated accordingly'; and there is a declaration that the enactment is made without recognizing the company's right to occupy the streets or to continue its service, but for the purpose of regulating and reducing its charges 'during the time it shall further act as a water carrier and tenant by sufferance of said streets.' But the enacting provisions, in the terms employed and by necessary intendment, are inconsistent with these declarations, and must be taken to override them. The first section establishes, as the maximum charges permitted to be made by the company, a detailed schedule of '*semi-annual* water rates payable *in advance* on the first day of May and November of *each year*.' The various uses are specified, and many of these are of kinds that cannot be discontinued on brief notice. There is a special rate for irrigation by the season, May 1 to November 1. There is a provision for meter rates, payable monthly, with a clause requiring the company to instal a meter for any person desirous of using water by meter. Section 2 provides that for hydrants, including 'those which may *thereafter* be ordered by the council to be set upon existing mains or upon *extensions* thereof', the city shall pay *annual* rentals. And § 4 imposes fines upon the company and its agents for any violation of the ordinances.

"Of course, these provisions are of themselves inexplicit; but in attributing a meaning to them the choice is between a liberal construction that preserves the substantial rights

of both parties and a strict construction, highly penal and destructive in its effect upon both. The subject-matter was a prime necessity of life, for which there was no substitute available. The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual. Without attributing to the initiators and to the city council a purpose to subject the inhabitants to grave danger of disease or worse, we cannot read the enacting provisions as leaving the company actually without the right to maintain its plant in the city thereafter, for necessarily this would leave it at liberty to discontinue the service at will. The alternative, which we adopt, is to construe the ordinance as the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe the inhabitants of Denver. It recognizes the dependence of the city upon this plant; by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates." * * *

The doctrine of the Denver Union Water Company case was again announced in the Detroit case. In that case the franchise right in certain streets had expired. There was no dispute upon this point. Still the municipality sought to regulate the conduct of the business of the railroad company within the city limits, including the business of the company over and through streets upon which it had no franchise, and upon such facts the United States Supreme Court said: "A principal ground upon which the bill was dismissed by the district court was the view of the learned judge that the power to compel the company to remove its tracks from the streets involving the non-franchise roads included the right to fix terms of con-

tinued operation upon such lines, whether remunerative or not. We cannot agree with this view. In our opinion the case in this respect is ruled in principle by *Denver v. Denver Union Water Co.*, 246 U. S. 178. In that case the franchise of a water company had expired, and the city might have refused the further use of the streets to the company. Instead of doing this it passed an ordinance fixing rates and requiring certain duties of the company. We held that in that situation the company was entitled to make a reasonable return upon its investment. So here, the city might have required the company to cease its service and remove its tracks from the non-franchise lines within the city. Instead of taking this course the city enacted an ordinance for the continued operation of the company's system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not. This action contemplated the further operation of the system, and fixed penalties for violations of the ordinance. By its terms the ordinance is to continue in force for the period of one year, unless sooner amended or repealed. This was a clear recognition that until the city repealed the ordinance the public service should continue, with the use of the streets essential to carry on further service. Within the principles of the Denver case this service could not be required without giving to the company, thus affording it, a reasonable return upon its investment. In the Denver case we said: 'The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual.'

"In the present case the service upon the terms fixed in the ordinance is continued for a year, the city reserving the right to repeal the ordinance at any time.

"It is clear that the city might have taken a different course by requiring the company to remove its tracks from

the non-franchise lines; it elected to require continued maintenance of the public service, doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the railway company to operate its lines. This amounted to a grant to the company for further operation of the system, during the life of the ordinance."

The foregoing authorities hold, in effect, that before ouster proceedings against the telephone company can be maintained, the city must abandon its powers of regulation over it, or at least decline to exercise them, and revoke or attempt to revoke, by proper legislative action, the right of the company longer to continue in its streets, and decline to accept service from it.

The judgment is reversed, and the cause remanded, with directions to dismiss the proceeding, without prejudice to the rights of all concerned.

Decision *en banc*.

Mr. Chief Justice Garrigues and Mr. Justice Burke concur.

Mr. Justice Scott and Mr. Justice Teller dissent.

Mr. Justice Allen and Mr. Justice Denison not participating.

Mr. Justice Allen and Mr. Justice Denison decline to participate in the decision, each having decided questions involved at *nisi prius*, Mr. Justice Denison having tried the cause finally. It therefore becomes necessary to determine what number of judges constitute the Supreme Court *en banc*, and how many must participate to decide a case.

Section 5 of Article VI of the Colorado Constitution reads: "The Supreme Court shall consist of seven judges, who may sit *en banc*, or in two or more departments as the court may, from time to time, determine. In case said court shall sit in departments, each of said departments shall have the full power and authority of said court in the determination of causes, the issuing of writs and the exercise of all powers authorized by the Constitution, or provided by law, subject to the general control of the court

sitting *en banc*, and such rules and regulations as the court may make, but no decision of any department shall become the judgment of the court unless concurred in by at least three judges, and no case involving a construction of the Constitution of this State or of the United States, shall be determined except by the court *en banc*."

Section 8 of Article VI provides: "The Chief Justice shall preside at all sessions of the court *en banc*, and, in case of his absence, then the judge present who would next be entitled to become Chief Justice, shall preside."

This section also provides that the judge having the shortest time to serve, not holding office by appointment or election to fill vacancy, shall be the Chief Justice, and of the two judges whose terms of office expire upon the same day, the younger in years of the two judges shall be the Chief Justice during the next to the last year of his term of office.

From these sections of the Constitution it will be noted that provision is made for the court to sit in either of two ways: In departments, or *en banc*. The number of departments may be two or more, but no decision of a department shall become the judgment of the court unless concurred in by at least three judges.

It is unnecessary to enter into a mathematical determination of the different combinations that would be possible for the creation of departments. Whatever the number of departments, or the number of judges constituting a department, there must be a concurrence of at least three judges for a department decision. There may be two departments, each composed of the Chief Justice and three other justices, or, according to the present arrangements, there may be three departments, each composed of the Chief Justice and two other justices. In either case, as already stated, three judges must concur in order to render a decision. In the one case three of four judges may render a court judgment, and in the other all three of the judges constituting the department must concur. Speculation might be indulged as to why the concurrence of three

judges is required, and it might be urged that the number fixed is that number which would be the minimum majority of a minimum quorum of all the judges when sitting *en banc*.

Under this view it would follow that, when the court sits *en banc*, the least number of judges which could constitute a quorum is four, and a majority of the four—that is, three judges—must concur in order to render a judgment of the court *en banc*. However, unless inference be drawn from what is said of the power of the department of the court and the number of judges necessary to a decision, the Constitution is silent upon the subject as to the number of judges required to constitute the court *en banc*. We say it is silent. This is true in so far as any express statement of the minimum number of judges constituting the court *en banc*, is concerned. It is perfectly clear, however, that the court *en banc* may be composed of less than all the judges, since it expressly declares that the Chief Justice shall preside at all sessions of the court *en banc*, and in case of his absence, then the judge present who would be next entitled to become the chief justice shall preside. Now, if the Chief Justice is absent because, for example, personally interested in the case or because he feels himself disqualified, then the judge present who would next be entitled to become Chief Justice, shall preside. If that judge is also absent, the inference is irresistible that the next judge *present* who would be entitled to become Chief Justice shall preside and there is no limit fixed by the Constitution as to how many judges might thus be absent.

Under a constitutional provision such as ours, a majority of the members of the court constitute the court *en banc*, and a majority of the court as thus constituted, of course may decide. Cases which directly sustain this principle are: *Oakley v. Aspinwall*, 3 N. Y. 547; *State v. Lane*, 26 N. C. 434; *Commonwealth v. Mathues*, 210 Pa. 372, 59 Atl. 961.

There is an old statute in this state, carried forward and found as section 1412 of the Revised Statutes of 1908,

which provides: "If there shall not be a quorum of the justices of the supreme court present on the first day of any term, the court shall be and stand adjourned from day to day until a quorum shall attend." * * *

This statute clearly determines, that which is necessarily implied in the constitutional provision, that a *quorum* of the justices may transact business and decide cases. The statute does not define a quorum. The word, therefore, must be held to be used in its ordinary meaning, and that meaning is a majority of the entire body. *Decker v. School District No. 2*, 101 Mo. Appeals 115, 74 S. W. 390; *Ex Parte Willocks*, 7 Cowan 402, 409, 17 Am. Dec. 525; *Zeiler v. Central R. Co.*, 84 Md. 304, 35 Atl. 934, 34 L. R. A. 469; *Snider v. Rinehart*, 18 Colo. 18, 31 Pac. 716.

The necessary and inevitable inference from the constitutional provision as to who shall preside over the court *en banc*, when the Chief Justice is absent, is that the court *en banc*, may consist of a less number than all the judges. If not equally divided, the inference is also irresistible that a decision may be made according to the views of the majority of the members of the court sitting.

The opinion in the famous "Telephone Cases" decided by the Supreme Court of the United States in 1888, the report of which fills the entire volume of 126 U. S. Reports, is illustrative of the power of a majority of a quorum to decide. These great cases were argued before the Supreme Court of the United States on January 24, 25, 26, 27, 28, 31, and February 1, 2, 3, 4, 7 and 8, in the year 1887. At the time of the oral argument the Supreme Court was composed of Chief Justice Waite and Justices Miller, Field, Bradley, Harlan, Woods, Matthews, Gray and Blatchford. Mr. Justice Gray, however, was not present at the argument, and for that reason took no part in the decision, and Mr. Justice Woods, by reason of illness, did not sit at the argument, and died April 14, 1887, before the cases were decided. Mr. Justice Lamar was appointed to fill a vacancy caused by the death of Mr. Justice Woods, and was sworn in on January 18, 1888, but, not having been a member of

the court when the cases were argued, took no part in the decisions. Only seven members of the court, therefore, participated. There were Chief Justice Waite, and Justices Miller, Field, Bradley, Harlan, Matthews and Blatchford. The opinion of the court was delivered by Chief Justice Waite, and was concurred in by Justices Miller, Matthews and Blatchford, with Justices Field, Bradley and Harlan dissenting. The decision was rendered by a majority of a quorum only, which number was not a majority of all the members of the court.

Upon the theory that a majority of the court constitutes a quorum, and this seems to be incontrovertible, we are of opinion that a majority of such quorum has full power to hear and determine any cause. Even upon this assumption three judges at least must concur in order to reach a final determination, just as that number is required in a department to finally decide. Any other rule might often completely paralyze and render impotent one branch of the State Government, a situation which is simply unthinkable.

Upon the question of how many judges constitute the court *en banc* and how many may decide a case, in which all the members of the court take part, the Chief Justice, Justices Allen, Burke and Denison concur. Justices Scott and Teller dissent.

Mr. Justice Teller dissenting: According to the majority opinion, the defendant is lawfully in the streets of Denver, not because it has a perpetual franchise to use them, as defendant claims, but because from the city's dealings with it, a license is implied to use said streets. From the facts of this license, it is concluded that, until it is revoked by the city, a proceeding in the nature of *quo warranto* to question the defendant's rights to occupy the streets may not be prosecuted. With so much of the opinion as appears to hold that the defendant has no franchise from the city, I heartily concur; but I cannot agree that the action was prematurely brought; or that it was not properly begun by the District Attorney on the relation of a citizen taxpayer.

The conclusion that the writ will not lie until the city

orders the defendant from the streets, results, in my opinion, with due deference to my associates thus concluding, from a misapprehension of the ground of the proceeding.

The statute makes it the duty of the District Attorney to bring the action "whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held." If, then, the District Attorney is of the opinion that a franchise is being unlawfully held, either by reason of the fact that the party has no franchise at all, or an alleged franchise which he deems invalid, his duty is to begin proceedings to determine such right. He is not required to wait until someone else acts. If the defendant had a license, that fact would not militate against the right of the state to determine whether or not the company is now lawfully in the streets of the city. Beyond doubt the state has the right to have determined the question of the authority of any person or corporation to occupy streets under a claim of right, whether based upon an alleged franchise or a supposed license. If there be a franchise or license the proof thereof is a matter of defense. Were the inquiry by the city, a different question might be presented, it not being at liberty to deny the validity of the license which it had assumed to grant.

It must not be forgotten that this is an action by the state in its sovereign capacity, acting through the District Attorney, who is specifically authorized by statute to act for the state in these matters. The state is the principal and the city the agent, and if the agent—the agency being special and limited—exceeds its powers, the principal is not bound by such acts. The defendant, having obtained, as it claims, through the city, rights which only the state can grant, either mediately or immediately, clearly the state need not wait for the city to take action to test the question whether or not there has been a valid grant of those rights. If the state must thus wait for action by the city, the latter might exercise any powers it chose to assert, and its subsequent refusal to question its own action would

leave the state powerless in the premises. That would effectually nullify all limitations on the powers of the city, and render unnecessary any consideration of what powers had been granted to it. This view is in accord with both reason and authority.

In *State v. Railway Co.*, 135 Iowa, 694, 109 N. W. 867, the court said: "It is a thoroughly well-established proposition that rights granted to a corporation, either directly or by the State indirectly through the act of a minor municipality authorized by the State, are to be regarded as franchises no less than is the right to be a corporation. Both classes of rights are derived mediately or immediately from the State, and both are subject to the inherent power of the State to guard against their abuse by the grantee or usurpation by a wrongdoer."

Again, speaking of the privilege of using city streets, the court said: "The municipality to which is given authority to grant such a privilege exercises a delegated power only, and it cannot grant to any person or corporation a privilege which is confessedly in derogation of the common right, in a manner which shall exclude the power of the State to inquire into its abuse, or to prevent the subversion of the public interests which the legislative grant was intended to promote."

And again: "To say that the State has surrendered to the city all its power and authority to protect public interests against usurpation, neglect, or abuse by a corporation of its own making, and that so long as the city authorities are content to remain quiescent the State is powerless in the premises, is to say that the State may surrender its sovereignty and the Legislature estop itself by an abdication of its legislative power. Even the State itself cannot constitutionally authorize the occupation of the street for anything but a public purpose, and if a city government by its indifference to public interests or by a mistaken estimate of its own power in the premises permits a corporation to occupy its streets without legal right to such franchise or to assume without authority other rights

which are not common to the people generally, the State has the inherent and reserved right to call upon such corporation to show by what warrant it assumes to hold or exercise such franchise. The right and power of the State over its highways, roads, and streets and its duty to preserve and protect these avenues of public travel against unlawful encroachment and obstruction are as wide as its territorial jurisdiction."

Counsel for plaintiff in error say that it should ever be borne in mind that the right to use the streets is derived from the state; yet they deny that the power that grants the right may inquire whether or not the use of a street is under a grant, or in accordance with one admitted to have been made. I confess my inability to follow counsel's reasoning. Since, then, the state can inquire as to the acts of its agent, whenever it appears that the public interest requires such inquiry, it can never be said that such inquiry, as to acts fully performed, is premature. It would seem that, after it was ruled that the proceeding was prematurely begun, no consideration of other questions argued was necessary.

The opinion, however, determines that under the circumstances recited, a private citizen, with no special interest involved, may not maintain an action of ouster; this, especially, it is said, because the city may, at any time, revoke licenses. This overlooks the statute which specifically authorizes the District Attorney to bring such a proceeding in the name of the state, on the relation of a private party. It is in no sense a private action. The relator, as in many other proceedings, merely acts, under statutory authority, or by established practice, to set the machinery of the law in motion. This proceeding is no more the private suit of the relator, than would be a prosecution under an information, as a basis for which he made the necessary affidavit. As well might it be said that a proceeding for constructive contempt is private, because it is initiated by the affidavit of a private party.

In *State ex rel. v. Railway Co.*, *supra*, objection was made that the relator, a private citizen, could not institute the proceeding, as is here contended. The court there points out that the purpose of the proceeding is to protect the public interest, and that the relator acts not for his private interest, but to set the machinery of the law in motion to vindicate the interests of the public.

The majority opinion refers to statements in the answer which, it is said, "tend to establish that the complaint fails to state facts sufficient to constitute a cause of action." Then follows a recital of the allegations which are presumably, the ones which discredit the complaint. This criticism of the complaint ignores our recent ruling, by the full bench in *Lockhard et al. v. The People ex rel. Weisbrod*, 65 Colo. 558, 178 Pac. 565. We there held that the complaint in *quo warranto* may be general in its terms, "alleging facts showing capacity to institute the action, and directly charging acts which show an intrusion into or the usurpation of an office, or franchise." We said: "The rule is that the state has no burden to assume in the first instance. The complaint or information is a challenge to the defendant to show by what right he is exercising a franchise or holding an office." The ultimate fact to be alleged in this case was that the defendant was exercising a franchise without right. *People v. Reclamation Dist.*, 121 Calif. 522, 50 Pac. 1068, 53 Pac. 1085. The attack on the complaint is, therefore, without basis.

The reversal of the judgment on the ground that the defendant has an implied, revocable license is without any support whatever in the record. The answer sets up, not that the city has done things from which a license to the defendant is implied, but that the defendant has from the constitution and the statutes a perpetual franchise, which neither the city nor the state can revoke, i. e., a contract with the state, which is protected from abrogation by the federal constitution. This claim to a perpetual franchise is repeated again and again, and nowhere in the record is there a suggestion that a right is claimed under an im-

plied license. The argument for plaintiff in error follows the same line.

It is true, of course, that a plaintiff may recover upon any right of action fairly stated in his complaint, and possibly, by a liberal construction of the allegations of the answer, the matter of an implied license might have been considered; but it is equally true that a party cannot try his cause on one interpretation of his allegations in the trial court, and change the theory of his case and obtain relief in a reviewing court on a new interpretation.

Counsel claim a franchise under section 13 of Article XV of the Constitution of Colorado; under the law of 1877; under the law of 1885, the city having given the required consent; and under the general incorporation laws of the state.

In view of the length of their brief, counsel kindly furnished the court an "outline of the briefs." In it I find this in capital letters: "Whether self-executing or not, the constitution, supplemented by the statutes and consent of the city, conferred upon all persons obtaining such consent the right to construct telephone poles and wires upon all of the public highways of the state, including streets and alleys of the consenting city; and when the right thus conferred was accepted by the actual construction of a plant, the constitution and statutes operated to grant a perpetual and irrevocable right to maintain and operate the telephone plant thus constructed."

And again: "The construction at some time in the past, with the consent of the municipality, having been thus admitted by the complaint, it follows that the Act of 1885 and the Act of 1907 have constituted and still constitute a continuing grant to the person in possession of said constructed telephone plant within the municipality of the right to operate and maintain it." The only claim of right to use the streets, which the plaintiff in error made at the trial or in the briefs on file here, is that arising from a perpetual franchise.

No attempt was made to show any other right until, on the second oral argument, counsel suggested that certain ordinances of the city passed since the transcript was filed in this court, should be treated as a recognition of defendant's right to use the streets. The various acts of the city which the majority opinion holds to have given the defendant a revocable license were pleaded, and treated in the briefs, as evidence of the city's recognition of an existing franchise, a right perpetually to occupy the streets.

To reverse the judgment on this record, and under such circumstances, is to violate the settled rules of practice, and establish a precedent which is likely to be productive of evil. I, therefore, feel impelled to record my dissent.

I am unable to agree with the conclusion announced that a majority of the five judges of the Supreme Court, that is to say three of them, may determine a case required to be presented to the court *en banc*. The question is not, in my opinion, to be determined by precedents of other courts, because of the peculiar provisions of our constitution.

This court is authorized to sit in departments consisting of three members, all of whom must agree upon a decision rendered by a department. The constitution requires that certain cases be determined by the court *en banc*. According to the rule laid down in the majority opinion, three judges may, if sitting *en banc* as a part of a quorum, which might be only four members, determine a constitutional question, the very authority which has been denied to them by the constitutional provision creating the departments. If the members of a quorum consisting of four judges be equally divided in opinion, the judgment under review is affirmed under section 403 of the code. These two judges may determine a constitutional question, which three judges may not constitutionally consider, if sitting in department.

I do not think that this court may, by its ruling, make nugatory a constitutional provision by a mere making of

the tribunal a court *en banc*, instead of a court in department.

Scott, J., dissenting:

This case was submitted and argued *en banc*.

The constitution provides that the court shall consist of seven judges. By the term "Court *en banc*" is meant the whole court as constituted. The decision purporting to reverse the judgment is but by three members of the court in agreement with it. It is therefore by a minority of the court as constituted.

The proposition is so unexampled, so shocking, and to my mind, so wholly opposed to the letter and spirit of the constitution and statutes, that I am compelled to regard it as a repudiation of the organic law and the statutes enacted under it, and fraught with the gravest dangers to constitutional government.

1. It may be stated as a universal rule of law, that the question as to the number of judges required to be present and necessary to authorize the legal transaction of business by a court is to be determined from the constitutional or statutory provisions creating and regulating the courts. And, further, that in the absence of a quorum of the number of judges required by law to hold court, a judgment rendered by the remaining judges would be regarded as a nullity, because in such case there would be no authority in the court to render the judgment. 7 R. C. L. 998.

In the absence of constitutional or statutory provision on the subject, a majority of the court would constitute a quorum. Our constitution and statutes are silent upon the subject as to what number of judges shall constitute a quorum.

2. Section 1523 Mills Statutes, 1912, provides: "If there shall not be a quorum of the justices of the Supreme Court present on the first day of any term, the court shall be and stand adjourned from day to day until a quorum shall attend; and said court may, there being a quorum present, adjourn to any day specified, as may be deemed advisable."

It will be seen that by this statute less than four judges are prohibited from holding court. They are even prohibited from adjourning the court without a quorum. And yet it is held in this case that three of the judges may pronounce a judgment of the court *en banc*, reversing *nisi prius* decision.

3. There are further limitations placed on the number of judges required to agree to the pronouncement of judgments by the Supreme Court. By section 2127, Mills Statutes, 1912, it is provided: "No punishment shall be inflicted in any case brought before the Supreme Court under the provisions of this chapter, unless a majority of the justices of said court concur in respect to such punishment."

4. Article VI, sec. 5, of the constitution of Colorado provides: "The Supreme Court shall consist of seven judges, who may sit *en banc* or in two or more departments as the court may, from time to time, determine. In case said court shall sit in departments each of said departments shall have the full power and authority of said court in the determination of causes, the issuing of writs and the exercise of all powers authorized by this constitution, or provided by law, subject to the general control of the court sitting *en banc*, and such rules and regulations as the court may make but no decision of any department shall become the judgment of the court unless concurred in by at least three judges, and no case involving a construction of the constitution of the state or of the United States, shall be decided except by the court *en banc*."

It will be here seen that a department of the court is expressly prohibited from rendering any decision involving a construction of the constitution of the state or the United States. It will not be contended that a decision of the case at bar does not involve a construction of the state constitution.

By this provision the court may consist of two, or, because of the limited number of judges, not more than three departments. If of two departments, then of four

judges each. Still a department is expressly prohibited from considering, to say nothing of determining, any case involving a construction of the constitution. If a department consisting of four judges may not even consider such a question, by what process of reasoning can we say that if three judges are sitting *en banc*, they may determine such a cause? Can it be said that in the enactment of their organic law, the people even intended such an absurdity?

Under the present organization of the court three members constitute a department with power to determine all questions of less importance than a construction of the constitution, yet this may not be done in any case without the concurrence of all the judges constituting the department.

If it was the intent and purpose of the makers of the constitution to permit three judges of the court to determine a constitutional question while sitting *en banc*, why is there such express prohibition of three judges sitting in department considering the question at all?

The conclusion of the majority would be precisely the same if our court consisted of nine judges, instead of seven. Five would constitute a quorum and three would be a majority of the quorum, and therefore the three of the nine judges would have the power to determine a constitutional question, while if the same three were sitting in department they are expressly denied the right to consider the question at all. Not only this, but the three who have assumed to construe the organic law in this case are at the same time denied the power to even open or adjourn court *en banc*. To my mind this not only trifles with the constitution but defies the plain import and purpose of that charter of the people's rights.

It is said, that a majority of the court constitute a quorum, and therefore that a majority of this quorum may determine a cause. There is no suggestion in either the constitution or statutes that supports such a conclusion.

But the very spirit of the contention is negatived by the provision of our constitution as relates to legislative acts.

A majority or a quorum of either house of the legislature may sit and transact business, but it is provided by sec. 22 of Article V of the constitution that "no bill shall become a law except by a vote of a majority of all the members elected to each house." Not only a majority present are necessary, but a majority of those elected.

Can it be assumed that the makers of the constitution ever contemplated that less than a majority of their highest court should construe the provisions of that instrument. The people of this state have shown great concern in the matter of court construction of their constitution. They have not only denied this power to a department of this court, but by another constitutional amendment, they have likewise denied such power to the District Court, a constitutional court of original and general jurisdiction, even in the first instance, a power which had theretofore been universally exercised.

5. Section 438 of the Civil Code also provides: "Whenever the Supreme Court shall be equally divided in opinion, on hearing an appeal or writ of error, the judgment of the court below shall stand affirmed."

Here is an express provision of the law which may not be overlooked. This provides that when the *court* shall be equally divided, the judgment of the lower court must be affirmed. This provision was applicable and enacted when the court consisted of three judges. It is equally applicable now when the court consists of seven judges. Both then and now the court consisted of an odd number of judges, and hence the court could not then and cannot now, be equally divided in opinion if all judges participate.

It can have no other meaning than that one-half of the largest even number of judges which may sit, one-half of six, to-wit, three, cannot reverse a decision of the lower court, and that in such case and where six judges sit, the judgment stands affirmed by operation of the statute alone.

Hence, if there were six judges sitting in the present case, three have not the power to affirm or reverse the judgment. The judgment is affirmed by operation of law alone.

It cannot be reversed by the votes of three judges. This for the reason that the constituted court nor a majority thereof has not voted for a decision, and therefore it has failed of a court decision, and there can be no decision in such a case except the decision of the law as provided by the statute.

So in this case, if one additional judge had participated, and had joined the two others in dissent from the proposed majority opinion, then and in that case the decision of the lower court must have been affirmed.

Thus by one additional dissent, and with no more than the three voting in the affirmative, the decision would have been changed from reversal to affirmance. The logic of the majority, then, is that with the two judges only dissenting, the judgment may be reversed, whereas, if three had dissented, the judgment must be affirmed. This presents a strange anomaly in judicial logic. When we reflect that not less than three judges in agreement can pronounce a decision, and then only in department, and this by the express mandate of the constitution, the unsoundness of the proposition that three judges sitting *en banc* may pronounce a decision, without any authority under the constitution of statutes, become apparent.

6. Our first constitutional convention submitted as a part of the proposed constitution the following, being adopted as section 5 of Article VI: "The Supreme Court shall consist of three judges a majority of whom shall be necessary to form a quorum, or *pronounce a decision*." Thus by express constitutional mandate a majority of the court was required to pronounce a decision. This remained a part of the fundamental law until the amendment of 1903, increasing the number of judges, it being omitted from the draft. It cannot be assumed that it was the purpose of the omission to change this fundamental policy, and to intend that a minority of the judges should pronounce a judgment of the court sitting *en banc*, else the amendment would have been so declared. The only reasonable assumption is that this question was deemed to be otherwise suffi-

ciently covered in the draft. To hold that it was the purpose to so revolutionize the law upon this grave subject, without even a suggestion concerning it, is to insult the intelligence of the general assembly submitting the amendment.

But the majority finding no authority under the constitution or statutes of this state, in support of their astounding conclusion, cite authorities from other states upon which they seek to rely.

7. The case of *Commonwealth v. Mathues*, 210 Pa. 372, 59 Atl. 961. This case was in review of an action in mandamus to compel the State Treasurer to pay salaries of judges fixed by the legislature, including judges of the Supreme Court.

The court consisted of seven judges. All but one was financially interested in the result. The one judge assumed to and did pronounce the decision of the court. He cites no authority for his unprecedented and arbitrary act. He does not even refer to the constitution or statutes of his state, from which he must have derived his authority, if he had any. It is a fitting case to cite in support of the remarkable action of this court in this case. It finds no support in the constitution or statutes of Pennsylvania, nor in common sense. The action of the single judge in assuming to render a decision for a court composed of seven judges is so unreasonable as to make it stand out in our jurisprudence as a monstrosity. Indeed it must be said that in the history of judicial decisions, it partakes of the characteristics of the Irishman's mule, in that it can have no pride of ancestry, nor hope of posterity.

8. In the case of *State v. Lane*, 26 N. C. 434, cited in the majority opinion, the Supreme Court of that State consisted of three judges. One of these had died, and the remaining two determined the cause. It was contended that a majority of the judges were without power to so hear and determine. This contention was denied and it was held that a majority of the court could pronounce a decision. It was there said: "Therefore, when the statute is silent

as to what number of the judges shall unite in the judgment, a majority may give it; and, in like manner, when it is silent as to the number of judges who shall unite in consultation, a majority must suffice."

This is precisely my view in this case, that is to say, when the Supreme Court sits *en banc*, it requires a majority of the judges of the court in agreement, to pronounce a decision.

9. The majority cite *Oakley v. Aspinwall*, 3 N. Y. 547, as in support of their position. The Court of Appeals of New York, by constitutional provision, consisted of eight judges. In the case considered, seven of such judges participated. Five of these, or a majority of the entire court voted for reversal, of a cause pending while two of the seven judges dissented. At the commencement of the hearing, one of the five judges so afterward voting for reversal, suggested that he was related in a remote degree to one of the parties, and offered to leave the bench. All parties to the action objected to this and urged him to participate in the decision, which he did. Subsequently, the defendant in error filed a motion to set aside the judgment of reversal upon the ground that the one judge was disqualified to sit because of his kinship to one of the parties, such judge having voted as one of the five judges. That motion was heard by the remaining six judges.

The majority opinion upon this motion severely criticises counsel for their conduct in consenting and urging the judge to sit, and afterward presenting the motion to set aside the judgment, because of his participation in the judgment, adverse to them. This motion to grant a rehearing, however, was sustained, the court holding that the disqualification could not be waived, by a vote of four to two of the judges of the six judges participating.

It is plain that the motion for a rehearing was based solely upon the disqualification of the judge who was one of the five constituting the majority of the court who voted for a reversal of the case in the first instance, and the inference is clear that the motion was based upon the fact

that with the elimination of the disqualified judge, there were but four judges remaining who had voted for the decision, or less than a majority of the court as constituted.

It is true that but four of the judges voted to sustain the motion for a rehearing, but this was a matter of procedure, and not a final judgment or decree of the court. And it is also plain that this was done under a statute of the state declaring that six members of the court should constitute a quorum. Our constitution and statutes are silent upon the question of the number of the judges that shall constitute a quorum of the Supreme Court.

Nowhere in any of the several opinions written in that case is it even hinted that less than a majority of the judges of that court may pronounce a judgment of the court in any cause pending.

10. The other case cited by the majority is what is known as the Telephone Cases, occupying Vol. 126, U. S. Supreme Court Reports, 126 U. S., 31 L. Ed. 863, 8 Sup. Ct. 778. Nowhere in these cases is the question we are considering suggested or determined. We have before us the simple facts only, that the Supreme Court of the United States consists of nine judges. Two did not participate. Four joined in the majority opinion, and three joined in the dissenting opinion. So that the prevailing opinion had the support of but four judges of the court, which is not a majority of the nine justices. Why this opinion was permitted to become the opinion of the court must remain to us purely a matter of conjecture, for the matter was not discussed in that case, and so far as I know, in any other. But as said in the beginning, the question of how many judges of a court may transact business or pronounce judgment is controlled by the particular constitution and statutes.

The constitution and statutes of the United States are very different from those of the State of Colorado in this respect. The number of judges which shall constitute the Supreme Court of the United States is not controlled by the Federal constitution. It is a matter wholly with Con-

gress, as are all other matters of organization and control, not left to the court itself. At the time the telephone cases were decided, there was a Federal statute which provided that six of the nine members should constitute a quorum, sec. 573, Rev. Stats. 1878. It may have been that either by act of Congress directly, or by permitted rule of the Supreme Court at that time, a majority of the statutory quorum was authorized to pronounce a judgment. In any event it was a question of statutory power. The decision throws no light one way or the other upon the question here.

It is plain that no respectable authority cited supports or tends to support the conclusion of the majority.

11. But that conclusion is based upon the mistaken assumption that the two non-participating judges are disqualified to participate in the case.

It is true that Mr. Justice Denison heard and determined the case in the lower court, but this is not a disqualification under our law. It must be assumed that he would not have heard the case below if he had in any sense been disqualified.

Why Mr. Justice Allen declines to participate I am not advised, but I know of no disqualification.

It is natural and proper that a judge who has presided at a *nisi prius* trial should be reluctant to participate in the hearing on review, and does not do so as a rule where there is a sufficient number of judges otherwise, to pronounce an opinion and justice may be done.

12. In the case of *D. C. I. & W. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. 234, it was said by Mr. Justice Elliott: "Having presided at the trial of this case in the District Court, it has been with great reluctance that I have consented to participate in the review of it in this court. But the circumstances attending the case in this court have been peculiar. The honorable commissioners first considered the case and reported a unanimous opinion affirming the judgment, though upon grounds somewhat different than those announced in this opinion. Upon my

accession to the bench, finding the judges divided in opinion in respect to the case, I waited for my Brother Hayt to qualify, hoping he and Chief Justice Helm would be able to decide the case without my intervention. But after patient consideration, they, being unable to agree, have insisted that it is my duty to sit in the case, else the decision might be deferred to the close of my term." It will be noticed that it was the view of the entire court that he should so participate in that case.

See also *Edwards et al. v. D. & R. G. R. Co.*, 13 Colo. 59, 21 Pac. 1011; *Bank v. Hummel*, 14 Colo. 276, 23 Pac. 986, 8 L. R. A. 788; *McClure v. Smith*, 14 Colo. 297, 23 Pac. 786; *Boettcher v. Colo. Nat. Bank*, 15 Colo. 23, 24 Pac. 582.

13. In the case of *O'Connor v. Smithers*, 45 Colo. 23, 99 Pac. 46, the facts as stated by the court were: "When these cases were presented to this court they were heard by four of the justices. Justices Helm, Goddard and Maxwell did not participate in the first instance, because they are candidates to be voted for at the next election. The four justices were unable to agree and no order was then made. Later, application was made by the petitioner to have the cases heard before the full court, and orders were at that time entered, the purpose of which was to preserve the *status quo* until the cases could be finally disposed of. On the hearing before the full court, respondents objected to Justices Helm, Goddard and Maxwell participating because of the fact that they were candidates on the tickets in question." It will be noted that a majority of the court sat in the first instance, just as in this case, that they were divided in opinion as in this case. The four judges sitting could have been divided in but one of two ways, either one to three, or equally. If they were divided in the proportion of one to three, then there was presented the identical situation as here, that is to say, three judges of the same mind, and therefore, if the position of the majority here is sound, the three judges could and should have rendered judgment. If they were equally divided in opinion and if, as the majority here say, a majority of a quorum have the power

of decision, then the court must have followed the statute in case of equal division and have declared the case to be affirmed under the statute.

Nothing is plainer than that the entire membership of the court repudiated such a doctrine and the three judges who declined to participate in the first instance, were called in and participated over the objection of counsel.

It is plain that it was a case wherein much adverse comment would and naturally did arise by reason of the three judges being candidates and at least publicly believed to be interested.

Such participation was necessarily very embarrassing to the three distinguished jurists even if it was strictly within the law, and we must assume that they would not have joined in the pronouncement of a decision if they could have believed and held with the majority, in this case, that a majority of a quorum, and not a majority of the court could pronounce a judgment of reversal.

It is apparent that in effect and in fact, though not in language declarative, the acts and proceedings in that case are an authority and should be controlling in this case upon the question I am considering.

14. But I am unable to see the consistency of action of the non-participating judges in declining to participate in the cause here pending before the court, and at the same time participating to the extent of adopting a rule in the same case, whereby the opinion of a minority of the court should have the same force and effect as if concurred in by a majority of the court.

Admittedly the opinion of the three must have been inoperative and void except as it may be said to be validated by the votes of these two judges, or at least one of them to hand it down as an opinion of the court. If it was a binding decision of the court, why did it require the votes of these two judges to pronounce it? If they had not so participated and voted, it could not have emerged as a judicial decision and would not now be entered as such.

Therefore, in my opinion, their participation in adopting the rule to make it effective was as vital and necessary as if they had joined in the opinion of the three judges. It appears to me that this attitude creates a distinction without a difference, a distinction to my mind as reasonable as if A charged with the murder of B, by pushing him over a cliff, whereupon he fell to the bottom of the abyss and was killed, and then to defend on the ground that he simply pushed B over the cliff, but that his fall and consequent death were caused by the natural law of gravitation.

With due deference to the judgment of my learned colleagues, I am forced to the irresistible conclusion that the action of the majority in this particular, constitutes in effect, a judicial usurpation of constitutional and legislative power, creating within the range of its possibilities grave danger to constituted government.

On Motion for Rehearing.

Garrigues, C. J.

(1) It is assumed in the argument on rehearing that the opinion gives the company a perpetual franchise. Also, that, as a condition precedent to terminating the license, the city would have to relinquish its right to regulate rates. Neither assumption is correct, and the opinion does not so hold. The opinion does not give the company a franchise, perpetual or otherwise.

(2) Regarding the power of the majority of a quorum of the court handing down an opinion, the Supreme Court of the United States, in *United States of America v. United States Steel Co.*, 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed., on the same day exercised like power by handing down an opinion only concurred in by a majority of a quorum of the court. The full bench consisted of nine judges, two were absent, seven were present constituting a quorum. Of the seven, three dissented and four concurred in the opinion.

Rehearing Denied.

As to the first proposition Mr. Justice Allen and Mr. Justice Denison do not participate.

Decided March 1, A. D. 1920. Rehearing denied June 7, A. D. 1920.

No. 9831.

SMITH ET AL. v. CAMPBELL.

ASSIGNMENT—*Second Assignment*, of what has already been assigned passes nothing.

Error to Adams District Court, Hon. Clarence J. Morley, Judge.

Department One.

Mr. HARRY BEHM, for plaintiffs in error.

Mr. J. PAUL HILL, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

To review a judgment for defendant in error plaintiffs in error have sued out this writ. They also ask the issuance of a supersedeas. The case is fully briefed and, both sides so requesting, we will determine it on this application.

The record consists only of complaint and answer, judgment and assignment of errors, and a stipulation of facts.

For convenience we will treat defendant in error, who as to a portion of the transaction comes here as the successor in interest of her deceased husband, as the principal throughout. For the same reason the fund in question, represented by a certain check deposited in the registry of the court, we will consider as cash.

Smith was indebted to Campbell. He leased ground from her for the season of 1919, and raised sugar beets thereon. The beets were contracted by Campbell to the Great Western Sugar Company at \$10.00 per ton. Smith's indebtedness to Campbell was secured by chattel mortgage

which included his interest in the sugar beets. Under the terms of the lease the landlord took one-third of the crop and the tenant two-thirds. During the farming season Campbell made additional advances to Smith and after the crop was marketed they had a settlement in full, by the terms of which all the property covered by the mortgage was turned over to Campbell and credited on Smith's indebtedness. This transfer was evidenced by a bill of sale which described the property as "all the goods and chattels" covered by the mortgage. There still remained due to Campbell from Smith \$2,100.00, for which amount he gave his note. Thereafter the Great Western Sugar Company paid an additional sum equal to \$1.00 per ton on the beets grown under the Campbell contract and covered by the chattel mortgage. It is this additional payment of \$602.09, now in the registry of the court, which is in dispute. Smith, having assigned his interest to Lehrman, now disclaims. Lehrman claims two-thirds of the fund under his assignment. Campbell claims one-third of the fund in her own right and the other two-thirds to be credited on the \$2,100.00 note. The judgment below upheld Campbell's position.

Campbell says this money is part of the payment for beets. Lehrman says it is a gift from the Sugar Company. The stipulation before us settles the question. "Thereafter * * * the Great Western Sugar Company * * * paid the additional sum of one dollar per ton for beets * * *. The * * * \$602.09 herein tendered into court is the additional payment for beets."

Smith's mortgage to Campbell covered these beets. They were applied on Smith's indebtedness, as evidenced by the bill of sale. The whole had become the property of Campbell prior to the pretended assignment to Lehrman, and Smith had nothing to assign. The intention of the parties is beyond doubt. Not knowing that the full purchase price had not been paid by the Sugar Company Smith failed to obtain, in his settlement with Campbell, the total credit to which he was entitled. Campbell takes

the entire \$602.09 but must correct the error in settlement by crediting two-thirds of this amount on the Smith note.

The supersedeas is denied and the judgment affirmed.

Garrigues, C. J., and Teller, J., concur.

No. 9832.

GREENLEES v. CHEZIK.

1. PLEADING—*Admissions by*, cannot be contradicted.
2. PAYMENT—*Plea of*, admits the original liability, and the defendant is estopped to deny it unless fraud, duress, or the like be shown.
3. PRACTICE IN ERROR—*Harmless Error*. The exclusion of evidence which is made immaterial by what appears in the record is harmless.
4. FRAUD—*Contributing to*. One whose negligence enables his agent to practice fraud upon another must answer for the injury.
5. NEW TRIAL—*Newly Discovered Evidence*, merely cumulative is no ground for a new trial.

*Error to Pueblo District Court, Hon. S. D. Trimble, Judge.
Department One.*

Mr. J. L. MCCORKLE and Mr. S. S. PACKARD, for plaintiff in error.

Mr. BENJAMIN F. KOPERLIK, for defendant in error.

Mr. Justice Burke delivered the opinion of the court.

PLAINTIFF in error, J. R. Greenlees, executed and delivered to one Mrs. Louise Wiley, his promissory note for \$1,750.00. Mrs. Wiley negotiated this note to defendant in error, J. A. Chezik. Chezik brought suit thereon against Greenlees and recovered judgment. From that judgment this writ is prosecuted and the cause is now before us on application for supersedeas. Extended briefs have been filed and no reason appears why the cause should not now be finally disposed of.

The validity of the judgment in question depends upon certain defenses to this note, but two of which demand consideration.

It is asserted that delivery of the note to Wiley was conditional, the condition being that it should be used only for the purchase of lots in the city of Pueblo, which were to pass to Greenlees under a contract which he had with Wiley; that this condition was never fulfilled; and that Chezik took the note with full knowledge of these facts, hence his title is invalid. It is clear that the lots mentioned were to be purchased from different owners at different prices, and transferred to Greenlees at a uniform price of \$40.00 each. It is therefore apparent that the delivery of the note to Wiley carried with it the right of negotiation, without which it would have been valueless. Moreover it is alleged, and undisputed, that this note was paid by Greenlees to Wiley, without cancellation or delivery. A plea of payment admits the original liability. *Mohr et al. v. Barnes*, 4 Colo. 350. Such admission by plea can not be contradicted by the party making it. *Harvey et al. v. D. & R. G. R. R. Co.*, 56 Colo. 570-572, 139 Pac. 1098; *Hamilton v. Moore*, 4 Watts & S. (Pa.), 570. Payment by the maker of negotiable paper, and plea thereof, is the most solemn recognition of execution, delivery and consideration, and these things he is thereby estopped to deny. Such estoppel might of course be removed by evidence of fraud, duress, etc., but this record discloses no such evidence.

Much space is devoted in these briefs to a ruling on the evidence of an attorney who testified that he advised Chezik of the conditions under which Wiley received the note. This testimony the trial court finally excluded on the ground that it was a confidential communication made by the attorney to Chezik in the course of professional employment. The confidential nature of the communication, as well as the employment, are denied and argued at length. Both become immaterial in view of what has already been said of the implied authority to Wiley to

negotiate the note and Greenlees' recognition of her title by payment.

The second defense is that Chezik took title to this note after maturity, in which event he would of course be bound by the payment, irrespective of knowledge. On this subject the trial court found for defendant in error on conflicting evidence and the rule is well established that such a finding will not be disturbed here.

Sayre v. Leonard, 57 Colo. 116-119, 140 Pac. 196; *Hal-lack et al. v. Stockdale et al.*, 14 Colo. 198-200, 23 Pac. 340; *Bd. Co. Commrs. v. Bd. Co. Commrs.*, 68 Colo. 428.

Greenlees left this note in the hands of Wiley from March 14, 1914, and it was not due until eight months from that date. He thus put it in her power to negotiate it regardless of the conditions under which it was delivered and so defraud either the purchaser or the maker. Chezik not only paid a good and valuable consideration for the note, but an adequate consideration. As between Greenlees and Chezik the loss, which must now be sustained through the bad faith of Wiley, must fall upon Greenlees, whose fault made it possible to perpetrate the fraud. *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 72 Pac. 873.

Plaintiff in error filed a motion for a new trial which was overruled. The only ground of this motion requiring our consideration is that of newly discovered evidence. The evidence, however, is merely cumulative and is insufficient to justify the motion. *Martin v. Hazzard Powder Co.*, 2 Colo. 596-600. Moreover it consists of public records of which Greenlees had presumptive knowledge, and of which, by the exercise of diligence during the trial, he might have had actual knowledge. 20 Cyc. 885. *Weimer v. Lowery*, 11 Cal. 104-113.

For the foregoing reasons the supersedeas is denied and the judgment affirmed.

Garrigues, C. J., and Teller, J., concur.

No. 9835.

KUNKLE v. SOULE ET AL.

1. CORPORATION—*Stockholders*, cannot repudiate a transaction which binds the corporation.
2. ACTION—*Defenses*—*Want of Consideration* is not established where an assignment of the right to employ an alleged invention, accepted by the directors of a corporation, without fraudulent practice by the assignor to induce the acceptance, is shown by undisputed evidence.
3. PRACTICE IN ERROR—*Judgment*. Action by stockholders of a corporation to rescind the purchase by the directors of an invention of little value. The defendant pleaded the delivery to the company of certain chemical apparatus as an additional consideration. The court below having found that the invention was of no assignable or market value, rescinded the contract, and ordered the chemical apparatus restored. The Supreme Court having found that the invention was not without value, reversed the judgment for plaintiff, and, as well, the order for the return of the chemical apparatus.

*Error to Mesa District Court, Hon. Thomas J. Black, Judge.
Department Two.*

Application for Supersedeas.

Messrs. WALKER & HACKMAN, for plaintiff in error.

Mr. M. D. VINCENT, for defendants in error.

Mr. Justice Denison delivered the opinion of the court.

THE defendants in error brought suit against Kunkle and The National Radium Products Company to cancel 51,000 shares of stock in the defendant company which had been issued to defendant Kunkle. The trial was to the court; judgment for plaintiff that the stock be surrendered. Kunkle brings error and moves for supersedeas.

The complaint stated that the only consideration for the stock was the assignment to the company by Kunkle of a certain process for extracting uranium, vanadium and radium from ores, and that the process was worthless.

A demurrer to this complaint was overruled, because, though it failed, the court thought, in its attempt to state

a case of misrepresentation and deceit, the complaint did show the stock to have been issued without consideration.

Upon the trial evidence was offered looking toward a showing of deceit and fraud but the court permitted no issue to be tried except want of consideration.

The evidence showed, by the minutes of the company's meetings, that the consideration for the stock was the assignment and disclosure by Kunkle to the company of a process for extracting the said minerals, alleged to have been contrived by him and to be efficient and also the assignment of certain inventions of his which are called patents, but, it would seem, were not then patented. The directors passed a resolution to purchase these patents and this process and to issue the 51,000 shares of stock in payment and it was done. The defendants claimed that there were other considerations, among them certain personal property, consisting of chemical apparatus and laboratory outfit.

The company sold and assigned the patents to another company in which Kunkle was interested, and, in payment therefor, stock in that company was issued and distributed among the shareholders in the defendant company.

The court found that the process had "no assignable or market value", that the patents "have no market value" and that by assigning them the company "obtained nothing of value." It also found and decreed "that the defendant company deliver to the defendant, George Kunkle, the items of personal property, if any, now in the possession of the defendant company, which the defendant, George Kunkle, has heretofore contributed to or delivered to the defendant company." The court does not find the process or patents to be worthless but merely without "assignable or market value." Exactly what "assignable" means in this connection we do not know.

Many corporations for the exploitation of patents, discoveries, mining claims and what not, issue their certificates of stock for property without market value. Very valuable property often has no market value.

The evidence is that the process, though compiled from other known processes, required skill to contrive, and if it would work had some commercial value.

The judgment, then, is not justified by the evidence, because, while the only issue was consideration or not, a consideration was shown by undisputed evidence; a very poor and inadequate consideration, perhaps, but one that, without fraud, was unanimously accepted by the board of directors; nor is the judgment justified by the finding, because property without assignable or market value may be a good consideration for the issue of stock.

The company itself cannot repudiate such a transaction and so its stockholders cannot. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Ambrose, etc., L. R.*, 14 Ch. Div. 390; *Foster v. Seymour*, (C. C.) 23 Fed. 65; *Langdon v. Fogg* (C. C.) 18 Fed. 5; *Stewart v. St. Louis R. Co.* (C. C.) 41 Fed. 736; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 200-203, 20 Sup. Ct. 311, 44 L. Ed. 423.

If the company had been defrauded it might have maintained some sort of action against defendant, Kunkle. If plaintiffs had been induced by false representations of Kunkle to purchase stock they might maintain an action against him for deceit.

If Kunkle had started the company and induced others to subscribe for shares for the purpose of selling his property to the company when organized, and had misrepresented his property for that purpose, the company itself, according to *Dickerman v. Northern T. Co.*, 176 U. S. 204, might have set aside the transaction, and, if the company refused to act, a stockholder might be so circumstanced as to maintain a suit. Possibly the facts are such that the complaint might be amended so as to state some such cause of action, but upon the only ground upon which the case was tried, want of consideration, the judgment, we think, cannot be sustained.

2. The finding of the court and the decree that property given by Kunkle to the company shall, upon the cancellation

of his certificate, be returned to him is inconsistent with the theory that there was no consideration. If such property was not given for the stock the return of it ought not to be required; if it was, then the stock was not issued without consideration.

For the reasons above stated the judgment should be reversed and new trial granted, with leave to amend.

Garrigues, C. J., and Scott, J., concur.

No. 9841.

KNOFF ET AL. v. GRACE.

1. STATUTE OF FRAUDS—Part performance of an oral contract for the sale of lands is a defense to an act impeaching such contract only where it appears that the act relied upon as part performance was at the time known to the other party in interest.
2. —*Idem.* The act relied upon as part performance must be something required by the contract. Doing something because of, or in reliance upon the contract, is not enough.

Taking possession of lands under a verbal lease for years, and payment of rent do not amount to part performance. The act relied upon must be consistent with no other theory than the validity of the alleged contract.

*Error to Morgan District Court, Hon. L. C. Stephenson,
Judge.*

Department Two.

Application for Supersedeas.

Mr. ARLINGTON TAYLOR, for plaintiff in error.

Messrs. JOHNSON & ROBINSON and Mr. WALTER S. COEN,
for defendant in error.

Mr. Justice Denison delivered the opinion of the court.

A DEMURRER to the complaint was sustained, the plaintiffs stood by the complaint and now ask for a supersedeas. Both sides ask us to determine the case now.

The action was by tenants to compel specific performance of an oral lease for three years beginning February 1st, 1919. The defendant, after rent had been paid for several months, refused to accept more and gave notice to quit. The plaintiffs rely on the doctrine of part performance of an oral contract to support their case.

The statutes in point are as follows: "Every contract for the leasing for a longer period than one year * * * of any lands * * * shall be void" unless in writing. G. S. 1908, § 2662.

"Nothing in this chapter contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreement." G. S. 1908, § 2664.

The question before us, then, is whether, under the above sections, the part performance shown in the complaint is sufficient to justify a decree for specific performance of an oral lease for more than one year.

The contract alleged is, "That plaintiffs did * * * enter into an oral lease with said defendant for said store room, the said lease to date from February 1st, 1919, and to continue for three years, with the option to plaintiffs to extend the said lease two years thereafter at a rental of \$75.00 per month payable monthly in advance; that said store room was to be used for a general retail grocery and merchandise store."

The facts relied on as constituting part performance are: (1) That, relying on said agreement, plaintiffs resigned their positions; (2) formed a partnership; (3) bought and installed furniture, fixtures and other equipment; (4) bought a stock of goods; (5) took complete possession; (6) established a paying business; (7) paid six months' rent; (8) it was the only available room; (9) no other now available; (10) business will be destroyed if relief is denied; (11) defendant will be unharmed if relief is granted; (12) that defendant is not in court with clean hands; (13) that defendant seeks to perpetrate a fraud by renting to another for a higher rent.

Section 2664 is a continuation of the equity rule in England and most of the United States. The principle which supports the rule is estopped by conduct, which, fundamentally, is fraud. It is, therefore, always necessary to show that the acts constituting part performance were done with the knowledge and consent of the other party to the contract. There is some question whether this is sufficiently alleged here but we do not determine the case upon that point.

The statute in question was passed for the reason that it was not safe to let proof, upon the questions therein referred to, rest in parol; it follows that to serve the purpose of the statute we must take care never so to extend the exceptions thereto, which are pressed upon us so constantly, as to let those questions become issues to be tried on oral testimony alone.

While it has often been truly said that equity ought not to allow the statute of frauds to be used as an instrument of fraud or wrong, yet the statute can never be enforced without some hardship and wrong. Wherever there is an oral contract on which a party has relied, it is in some degree, a wrong and hardship upon him to hold it invalid, and if there is no oral contract there is no room for the statute to act; therefore the enforcement of the statute must always be, in a sense (though, of course, not in legal contemplation) a fraud or wrong upon him against whom it is enforced.

It is necessary, then, to keep carefully within the principles which bound the rights to claim exemption from the terms of the statute. One of those rights is expressed in § 2664, above quoted. Briefly expressed, the rule is that specific performance of an oral contract will be enforced, according to the rules of equity, in favor of one who has partly performed it.

What are these rules of equity? One of them is that part performance must be part performance, *i. e.*, it must be the performance of something required by the contract. *Von Trotha v Bamberger*, 15 Colo. 1, 12, 24 Pac. 883.

Doing something because of the contract or in reliance on it is not enough. *Henry Jennings and Son v. Miller*, 85 Pacific, 517, 48 Ore. 201.

There is nothing in the plaintiffs' thirteen points that is required by the contract except payment of rent and nothing in them that is contemplated by the contract except taking possession. There are authorities which hold that taking possession and payment of rent constitute sufficient part performance, but this leaves all proof of the term of the lease to oral testimony and, in a great majority of cases, abrogates the statute. Practically all claims by tenants that there is an oral lease for more than a year are made after the tenant has taken possession and paid rent. We must say, therefore, that mere possession and payment of rent will not amount to part performance, for the purposes now under consideration.

The case of *Adcock v. Lieber*, 51 Colo. 373, is not inconsistent with these conclusions, because in that case, the contract provided that the tenant should leave his ranch and come to Hugo to live and take charge of the leased hotel and he did so.

It is also the rule that what is done as part performance must, to escape the statute, be consistent with no theory other than that of the alleged oral lease. What is fairly referable to some other cause than the contract as alleged will not be regarded as sufficient part performance to justify a decree of specific performance. *Von Trotha v. Bamberger*, *supra*; *Jenning v. Miller*, 48 Ore. 201, 85 Pac. 517; *Morrison v. Herrick*, 130 Ill. 631, 642, 22 N. E. 537; *Wood v. Thornly*, 58 Ill. 468; *Koch v. Nat'l. Bldg. Assn.*, 137 Ill. 497, 27 N. E. 530. The reason for this rule is that an act which is consistent with some contract other than that alleged does not tend to prove the latter. For example, in the present case possession and payment of rent are as consistent with a tenancy from month to month as with one of a year or more. So the installation of trade fixtures is consistent with a monthly tenancy, because the tenant would be obliged to install them whatever his ten-

ancy. This distinguishes the present case from those where the alterations have been so great and permanent as to convince one that a long and definite tenancy was expected. The whole proof of the terms of the contract, therefore, is left to oral testimony, which is what the statute seeks to prevent. The judgment should be affirmed.

Garrigues, C. J., and Scott, J., concur.

No. 9508.

HOEHNE DITCH COMPANY v. JOHN FLOOD DITCH COMPANY.

1. STATUTE OF FRAUDS—*Contract for the Carriage of Water.* A verbal contract by the proprietors of an irrigating ditch to carry the waters of another ditch is not within the statute of frauds. *Yunker v. Nichols*, 1 Colo. 551, followed.
2. —*Part Performance.* Verbal contract to carry water for 99 years was completely observed by the parties during the first irrigation season. *Held* it could not be said that the contract was only partly performed, in the ordinary sense.

Error to Las Animas District Court, Hon. Harry S. Class, Judge.

Mr. FORREST C. NORTHCUTT and Mr. JESSE G. NORTHCUTT, for plaintiff in error.

Mr. HENRY HUNTER and Mr. FRED A. SABIN, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff in error, plaintiff below, for many years prior to the institution of this suit, owned and operated the Hoehne ditch, irrigating lands thereunder, and diverting water from the Purgatoire, or Las Animas, River, in Las Animas County, having its headgate a few miles below the town of El Moro. In the year 1909, the headgate of plaintiff's ditch was destroyed by flood, whereupon the plaintiff entered into a contract with the Model Land and

Irrigation Company, which owned and operated a ditch diverting water from the same stream at a point above plaintiff's headgate, wherein the Model Company, for a consideration, agreed to carry the waters to which the plaintiff was entitled, to a point designated, for a period of ninety-nine years. This contract was in operation and the water to which plaintiff was entitled was carried through the Model ditch until June 4, 1918.

The defendant Ditch Company, before and during the period above stated had a ditch through which it diverted water from the same stream at a point between the point of diversion of the Model ditch, and the old point of diversion by plaintiff. Controversy arose between the Model Company and the plaintiff, and the plaintiff sought to make a contract with the defendant Ditch Company whereby its waters might be carried through defendant's ditch.

The complaint alleges the consummation of such a contract between the plaintiff and the defendant, the John Flood Ditch Company, whereby the latter agreed to carry the waters of plaintiff through defendant's ditch at the agreed price of one thousand dollars per year for a period of ninety-nine years. It is alleged that this contract was verbal, but intended by the parties to be reduced to writing and executed; that after the said agreement was made, and with the knowledge and encouragement of defendant, the plaintiff instituted suit in the District Court of Las Animas County to cancel its contract with the Model Company, in which action, the Model Company filed its written consent to such cancellation, and a decree was entered cancelling such contract.

It is further alleged that thereafter and with the consent, advice and encouragement of the defendant company, and in pursuance of their said agreement, a division box was placed by the plaintiff in the defendant's ditch, and on about June 9th, 1918, the water to which plaintiff was entitled under its decrees was thereafter turned in by plaintiff and carried by defendant according to the terms of the agreement until September 26th, 1918.

It is further alleged that with the mutual understanding of the requirements of law, and in accordance with the desire of both parties, after a discussion of the matter between them, and for the purpose of making effective the terms of the contract and in compliance with law, the plaintiff, on the 18th day of June, 1918, filed its petition in the District Court of Las Animas County for a decree changing the point of diversion of its waters from the headgate of the Model Company to the headgate of the ditch of the defendant, which decree was entered on the 31st day of August, 1918, granting the change. Also, that prior to obtaining this decree, so changing the point of diversion, and prior to the institution of such suit, and in accordance with the consent and agreement of the parties, the plaintiff sought and obtained from the Division Superintendent leave to change the point of diversion under a joint arrangement, and under the theory of having loaned its waters to defendant, but in fact and with the knowledge of the parties, including the Division Superintendent, this was for the purpose of enabling the parties to carry out their contract until such time as the decree to change the point of diversion might be finally entered.

The complaint then alleges in substance that notwithstanding the plaintiff and defendant through their respective officers and agents met from time to time for the purpose of crystallizing their agreement theretofore made, into a written contract, no controversy arose and there was no suggestion of a change in any of the stipulations theretofore agreed to, but that finally the defendant denied ever having entered into a contract, and repudiated any obligation to the plaintiff, declining to carry its water, ordering the same shut out of the division box, and finally, on the day after the summons and notice of application in this case were served, tore out the division box.

The defendant answered in substance: "1. That it never entered into any contract, orally or otherwise, with the plaintiff to carry its water.

2. That what it did do in the way of carrying water for the plaintiff was without charge, and purely as an accommodation.

3. That whatever contract was attempted to be entered into, if any, was not made with the authority and under the direction and with the consent of the stockholders or board of directors of the defendant company; that such attempt, if ever made, was with the president and secretary of the company only, and that the subject matter thereof was *ultra vires*, both as to the corporation and as to the power of the officers.

4. That the contract, if ever verbally agreed to, was not to be performed under the terms thereof within one year, and was, therefore, void under the statute of frauds, and unenforceable."

The defendant demurred to the evidence of plaintiff, which demurrer was sustained by the court, and judgment rendered dismissing the complaint and suit without prejudice. The defendant offered no testimony and therefore there is no conflicting evidence in the case.

The plaintiff seems to have proven clearly the allegations of fact set forth in its complaint, and the only questions to be determined are as to conclusions of law, raised by the fourth proposition as above set forth.

As we see from the record, it appears that the only directors of the defendant company were Mary John, president; William John, her brother, secretary; and their mother.

The circumstances under which the agreement was made were that there had been much discussion and for some time among the persons connected with both plaintiff and defendant corporations, concerning the differences between plaintiff and the Model Company, and the desire of the plaintiff to be relieved of its agreement with that company.

Mr. Jeffreys, who seems to have been the manager for the plaintiff testifies in substance that: "In the early part of May, I spoke to her (Mary John) and told her that prob-

ably we would find it necessary to endeavor to cancel our contract with the Model Ditch, and I asked her about carrying the water. She said that they would carry the water. That was all she said at the time. Shortly prior to instituting the suit (meaning the suit to cancel the Model contract) we had another conversation. I said, 'Miss John, I understand from one of our people in the ditch that you will carry the Hoehne water', and she said 'Yes'. She understood from the other party what the consideration was, and I told her what I understood from him, that the water would be carried for one thousand (\$1,000) dollars a year, and she said that was 'all right'. We held our meeting (meaning the meeting of the plaintiff's directors) and after holding the meeting, Miss John came to my office, and I said to her, 'Miss John, we are going to institute a suit to cancel the contract with the Model people, and I would not enter this suit, except that I know that you are going to carry the water for the Hoehne ditch as agreed with the other party.'

Q. What did she say?

A. Well, I think that she said, "That is fine."

It seems that at this time Will John was absent from the state, and it was agreed that they should wait for his return before executing the written agreement. In the meantime, the plaintiff had secured the cancellation of the Model contract and proceeded, as before stated, with the matter of securing the decree changing the point of diversion.

It also appears that there were two brothers owners of water rights, and that their supply was carried through defendant's ditch and who objected to the agreement between plaintiff and defendant, on the ground that it might interfere with the service to them. They made their protest to Mary John, president of defendant corporation, who assured them that it would not impair their service, and that they were too late in any event, for the reason that the agreement had been entered into.

It also appears that the parties plaintiff and defendant, at a time after Will John had returned, met at the office of

Mr. Coil, an attorney acting for both parties, for the purpose of drafting and executing the contract; that at this time they had the Model contract before them, and all agreed that this contract should be followed in form and substance, except as to names and consideration, with some other changes not material here.

This form contained a provision as to the time for which the contract was to run, of ninety-nine years. However, there arose at this meeting the question as to whether or not the agreement would, under the law, make the defendant a common carrier, and thereby cause an increased tax upon defendant's property. By reason of this question only, the agreement was not drafted and executed at the time, and it was agreed that the parties should seek advice of Miles G. Saunders, an attorney at Pueblo, upon the question thus raised.

This was later done and Mr. Saunders apparently did not determine the legal question, but suggested it might be avoided by the process of loaning water, which was adopted and followed in the manner heretofore suggested.

Under this state of facts, there can be no question but that the minds of the parties had met in agreement, and we have only to determine whether or not such an agreement is valid and binding in the sense that it may be specifically enforced.

The contention of the defendant, which apparently was sustained by the court, is: "(1) That the contract in being incapable of performance within one year from its date, and not in writing, is within our statute of frauds, and void, and that part performance does not take it out of the statute of frauds."

As against this, it is contended by the plaintiff in substance, that: "The contract is one relating to real property, and that part performance thereof takes it out of the statute of frauds, or rather estops the defaulting party from pleading the statute of frauds, and becomes enforceable at the suit of the aggrieved party upon such part performance.

Second: That even if not a contract for an interest in real estate, but such as held by the court, viz: a contract for service, it is nevertheless under our statute removed from the statute of frauds, and is subject to specific performance upon the part performance being established by proof.

Third: Even though the contract for its legality may have required the authority of the board of directors, yet being entered into by the president and secretary of the company who likewise constitute a majority of the board of directors, and its benefits being accepted and retained by the corporation, with knowledge of the facts, it is estopped from ascertaining the illegality."

It is not disputed that payment of the consideration due was tendered to and refused by defendant. So that in all particulars it appears that the plaintiff had fully complied with all the provisions of its agreement.

It is contended that the agreement being one which was not to be fully performed within one year is void under the statute of frauds, and here arises the serious question of the case. The very nature of this case as appears from the above statement of facts necessarily involves a public policy as indicated by the constitution and statutes and as construed by our courts. There is more than a private interest involved.

It appears to us that the principle involved in this question has in effect been determined by our courts in our very early history and consistently followed. The case of *Yunker v. Nichols*, 1 Colo. 551, involved the precise question of whether or not a verbal contract relating to the carrying of water was within the statute of frauds. It is argued here by the plaintiff that the contract is one involving an interest in real property and that for such reason may be enforced under the rule of part performance, which takes it out of the statute of frauds, and on the contrary it is contended that it is purely personal in its nature and is within the statute.

We think that this distinction is not material here and discussion of the question not important nor necessary.

The Yunker case was determined by a court consisting of three of our pioneer judges, very much revered, and the great ability of each will forever remain unquestioned. They did much to formulate the now fixed principles concerning the great industries of mining and irrigation. In the case cited, Justice Hallett wrote the opinion of the court; Justices Belford and Wells each wrote a learned and exhaustive opinion. These three opinions are well worthy of the careful examination and consideration of lawyers.

Yunker and others constructed a ditch which all were to use for the irrigation of their respective lands. This was under a verbal agreement. After construction and use, the defendant Nichols, whose lands were above those of Yunker, diverted the water and thus deprived Yunker of the use of his claimed water. The case turned upon the question of whether or not the verbal agreement between the parties was within the statute of frauds. It was there held that such a verbal contract was not within the statute of frauds, and further, that it involved a right that may be acquired under the laws of the state independent of consent or contract.

In this case the contract cannot be said to be but partly performed in the ordinary sense, for it was as completely performed for the first irrigation year as it could have been in any one of the succeeding ninety-eight years.

In the case of *McClure v. Koen*, 25 Colo. 284, a verbal contract between the parties provided that Koen should have the use of water through the canal for a specific tract of land, in consideration for his assistance in the construction and maintenance of the canal. After compliance with the agreement and use of the water for some years, Koen was denied this right. Under that agreement, it must be construed to intend the perpetual use, and not limited to any number of years as in this case. In an action to compel the enforcement of that contract, the court said: "It is further insisted, however, that the evidence having disclosed that the agreement relied on is an oral one, the statute of frauds may be invoked to defeat its enforcement; and furthermore,

that the right sought to be established, being an easement in the ditch and an interest in realty, it is not transferable except by deed; and therefore, that this agreement is ineffectual to vest title in the plaintiff. A sufficient answer to this contention is that the undisputed evidence clearly establishes the agreement, and a complete performance of its conditions upon the part of the plaintiff and his grantor, possession taken thereunder and a user of the water for several years.

It is well settled in this jurisdiction that, although an oral contract relating to realty is within the statute, where a consideration has passed, and it has been fully performed by both parties and possession taken in pursuance thereof, the bar of the statute is removed and equity will enforce the right thus acquired. *Schilling v. Rominger*, 4 Colo. 100; *Lipscomb v. Nichols*, 6 Colo. 290; *Tynon v. Despain*, *supra*. (22 Colo. 240.)

Under this rule the plaintiff established his right to an interest in the ditch that equity will recognize and protect; and a decision as to whether or not such interest is ordinarily transferable otherwise than by deed, is unnecessary to the determination of the case."

Certainly that agreement for the perpetual use was not to be completely performed within one year, and its performance for a few years was there held to be sufficient performance of the contract to take it out of the statute.

In such cases the court generally treat such contracts as executed rather than executory in their nature, in the application of the doctrine of part performance. It will be noted that our statute recognizes this doctrine of the equity powers of the court, by declaring in express terms that: "Nothing in this chapter contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreement." 2nd Mills, sec. 3063, p. 1367. It will be seen that the language of the statute makes this qualification apply to all provisions contained in the chapter relating to frauds and perjuries, and does not limit it to contracts involving an interest in real estate alone.

The general rule relating to this subject as applied in the western states is stated by Mr. Kinney in his work on irrigation to be: "As is the case with the acquisition of rights of way and other interest in land, rights to the use of water, or water rights, may be acquired without a formal deed of conveyance. One of the exceptions mentioned to the general rule in a previous section is by a parol contract, for a good consideration, all or a portion of which contract has been executed, and of such a character that a court of equity will enforce a specific performance. An agreement of this nature takes the case out of the statute of frauds and is valid as against the original grantor and as against all parties having notice thereof. It was also held in a recent Oregon case that a parol sale of land and appurtenant water rights for a consideration and a surrender of possession thereof to the purchaser, created an equitable estate in the water rights which a court of equity was bound to protect. Therefore, the grantor cannot revoke such a contract after the grantee or licensee has expended money in making valuable improvements upon the strength of the contract, in order to conduct the water to the place of use. So, under this principle it is held that a parol agreement between parties who have settled upon lands near a certain stream as to the amount of water which each may take from the stream, if acted upon for a time by the parties, will be enforced in a court of equity. But to successfully rely upon a contract of this nature it is held that it must be made for a consideration, and must either be executed in full or partly executed, and the grantee must be able and willing to fully execute the contract upon his part." Kinney on Irrigation and Water Rights, 2nd Edition, sec. 998. The principle above stated is sustained in *Graybill v. Corlett*, 60 Colo. 551.

It is indeed a generally prevailing state policy in those states dependent upon irrigation largely for successful agriculture, both in the interest of economy and to prevent any unnecessary waste of land in the construction and use of ditches, that where one ditch can answer the purpose of

more, the right to use the same ditch is granted to others than the owners.

This principle was enacted into our general irrigation act of 1881, and the reason for it is well stated by Mr. Justice Hayt in *Downing v. More*, 12 Colo. 316, in the following language: "So long as the state remained but sparsely settled, and mining and stock raising were the chief industries, no particular hardship resulted from such a law; but with the increase of settlement, the growth of the agricultural interests and the rise in the value of farming lands, a change in the law became imperative, and in obedience to this demand the statute of 1881 was passed. It will be noticed that in the *first* section of the act provision is made against burdening improved or occupied lands with two or more ditches for the purpose of conveying water through such lands without the owner's consent; while by section *two*, the route to be selected through said lands is designated. The *third* section is to give effect to the first and second sections by prohibiting a party who has constructed a ditch to convey water through such lands to lands adjoining or beyond, from preventing other parties from enlarging and using such ditch when necessary for the purpose of conveying water through the same lands."

While the ditch there involved, by reason of its private character, was held not to be within the statute, yet it is not contended that the defendant's ditch is of that character, and it must be therefore held to be within the provisions of the statute.

Here, as was said in the Graybill case, the verbal contract and the acts and conduct of the parties under it constituted an irrevocable license.

Some objection is made under a claim that the ditch must be enlarged in order to carry out the agreement. That may be so as time advances, but it was not discussed or considered in the making of the agreement, and, besides, others supplied by defendant's ditch were assured that the ditch would carry the plaintiff's water without interfering with such rights.

But the fact remains that the ditch did carry plaintiff's water for one irrigation season and so far as appears here, did so carry it without inconvenience or complaint, either from the defendant or from others whom it served.

The judgment is reversed and the cause remanded.

Reversed.

Garrigues, C. J., and Denison, J., concur.

No. 9704.

GERARD v. COSTEN.

1. PRACTICE IN ERROR—*Oral Evidence*, heard in the court below is, upon error, viewed in the light most favorable to the party prevailing below.
2. CONTRACT—*Undue Influence—Promise to Marry*. Bill to vacate a conveyance of lands upon the ground of undue influence, plaintiff alleging that the defendant promised to marry him, and by reason of this promise the defendant had acquired influence over him, and had induced him to execute the conveyance without consideration.

The evidence examined, and held to justify a finding for defendant below.

Error to Kiowa District Court, Hon. C. S. Essex, Judge.

Mr. S. S. PACKARD, for plaintiff in error.

Mr. CHARLES B. HUGHES and Mr. L. E. LANGDON, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is a suit to set aside two deeds which had been executed and delivered by the plaintiff to the defendant. Relief is sought upon the ground of undue influence. The complaint alleges "that about the year 1909 the said defendant falsely and fraudulently promised to marry the plaintiff without any intention of carrying out or perform-

ing said promise"; that she has ever since refused to fulfill the promise; that by reason of the promise the relations between plaintiff and defendant became confidential, and that "defendant acquired thereby an undue influence over the mind of the plaintiff"; that she exercised such undue influence, and thereby induced the plaintiff to execute and deliver the deeds in question.

The answer denied the foregoing allegations, and for a further defense alleged facts showing that the deeds were made for a valuable consideration.

The trial court found the issues for the defendant, and dismissed the case. The plaintiff brings the cause here for review, and contends that the court should have found the issues for the plaintiff instead of for the defendant.

One of the deeds in question was executed and delivered on January 5, 1914, and the other on January 16, 1915. The plaintiff testified that each deed was executed without any consideration, and that the conveyance was made because the defendant had promised to marry him. On the other hand, there was evidence adduced by the defendant which is amply sufficient to sustain a finding that for each deed there was a consideration in money, and that the consideration was adequate.

There is sufficient evidence to support the trial court's finding, if the same may be implied from its general finding, that the defendant never promised to marry the plaintiff. Assuming, however, that such promise was made, and assuming further, without conceding or deciding, that the relations between the parties were of such a confidential nature as to raise the presumption of undue influence, such circumstances would not, in this case, affect the result. The evidence in the case still remains sufficient to justify a finding that no undue influence was exercised by the defendant over the plaintiff in connection with the execution of the deeds in question.

The evidence in the case is both oral and documentary. The former should be viewed in the light most favorable to the party prevailing below, in this case the defendant. As

to the documentary evidence, we are at liberty to draw our own deductions from an original examination of the same. On reviewing the record, under the foregoing rules, we conclude that the evidence warrants the judgment.

The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9812.

SAN LUIS VALLEY BUILDING & LOAN ASSOCIATION v.
HOLBERT.

CONTRACTS—Construction. An unreasonable purpose should not be imputed to the parties.

A contract provided for the payment of \$14,000 in monthly installments in satisfaction of "both principal and interest upon the unpaid part of the purchase price, to be continued" "until the same equals \$14,000 with interest upon said sum from the date hereof, until payment thereof." *Held* that the first clause was controlling, and that the purchaser having complied with it was not required to pay in addition interest upon the principal of \$14,000.

Error to Alamosa District Court, Hon. Jesse C. Wiley, Judge.

Application for Supersedeas.

Mr. ALBERT L. MOSES, for plaintiff in error.

Mr. J. D. PILCHER and Mr. CHARLES H. WOODARD, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error, having purchased property which his vendor held under a contract of sale with the plaintiff in error, on which a part of the purchase price had not been paid, brought suit to compel the acceptance of a balance theretofore tendered to said association, and refused

by it. The defendant claimed that the amount tendered was too small. The court found for the plaintiff, and entered judgment accordingly.

The only question which we are asked to consider is that of the amount due on the contract at the time of the tender. Provision for payment of the purchase price of \$15,000.00 was as follows: "One Thousand (\$1,000) Dollars at the time of the signing, ensealing and delivery of this agreement, the receipt of which said sum of One Thousand (\$1,000) Dollars is hereby confessed and acknowledged, and the remaining Fourteen Thousand (\$14,000) Dollars, in equal monthly installments of One Hundred and Seventy-six Dollars and Sixty-six and Two-thirds Cents (\$176.66 $\frac{2}{3}$), payable on the 15th day of each and every month during the life hereof, beginning with the current month, it being understood and agreed that the said sum of One Hundred Seventy-six (\$176.00) Dollars and Sixty-six and Two-thirds ($\frac{2}{3}$) Cents per month is in payment of both principal and interest upon the unpaid part of the purchase price of the premises hereinbefore described, and that such monthly payments shall continue to be made by the party of the second part to the party of the first part until the same equals the sum of Fourteen Thousand (\$14,000) Dollars together with interest upon said sum of money from the date hereof until the payment thereof at the rate of Eight (8) per centum per annum."

Counsel for plaintiff in error contends that this requires the payment each month of interest on \$14,000.00 regardless of what may have been paid upon said principal sum. The judgment allows interest, each month, on the principal sum after deducting all payments made thereon. Counsel's contention is based upon the words "with interest upon said sum of money from the date hereof until payment thereof at the rate of eight per centum per annum." Interest, he says, is to be computed monthly on "said sum" which is \$14,000.00. If the parties had so intended they would, naturally, have provided that \$83.33 $\frac{1}{3}$ be applied on the principal, and \$93.33 $\frac{1}{3}$ on interest, each month, there

being on counsel's theory, no variation from month to month, in the amounts to be applied on principal and interest, respectively.

The contract must be construed as a whole, and no unreasonable intent should be imputed to the parties. It would require very clear and express provisions in such a contract to justify the conclusion that the vendee agreed to pay eight per cent interest on the principal sum, regardless of the amount by which it had been reduced. In the paragraph quoted it is agreed that the \$176.66 $\frac{2}{3}$ per month, is, in part, in payment of "interest on the *unpaid* part of the purchase price." The unpaid part of the price, which is to be the basis for computing the interest, is that price less the total paid thereon.

This construction is not in conflict with that part of the contract upon which plaintiff in error relies. It makes the agreement reasonable and fair, and is, we think, according to the intent of the parties. The court did not err in its interpretation of the agreement.

Inasmuch as the plaintiff tendered the amount due, before there was any default in payment, there was no forfeiture, and the court rightly denied relief under defendant's counter-claim.

The judgment is affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9681.

UNITED CIGAR STORES COMPANY v. THE PEOPLE.

Reversed on authority of *Denver v. Frueauff*, 39 Colo. 20.
Error to Denver District Court, Hon. Francis E. Bouck,
Judge.

Messrs. O'DONNELL & GRAHAM and Mr. GEORGE W. MUSSER, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, and Mr. FOREST C. NORTHCUTT, Assistant, for The People.

Per Curiam:

This case is one involving the same matter determined in *Denver v. Frueauff*, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521, and *Denver v. United Cigar Stores Company*, 68 Colo. 363, 189 Pac. 848, as to the validity of so-called trading stamps. These two decisions are controlling on this application for supersedeas, and are decisive of the merits of the case. The judgment is reversed and the cause remanded to the trial court with directions to dismiss the complaint.

Judgment reversed and cause remanded with directions.

Decision en banc.

No. 9729.

JOHNSON v. RYCRAFT.

BILL OF REVIEW—*Leave to File*, is not necessary where it is merely sought to correct an error of law apparent on the face of the record; otherwise where newly discovered evidence is relied upon. Where both error in law and new matter are asserted, leave must be obtained. Error appearing only by reference to some public office does not entitle the party complaining to file his bill without leave.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. J. C. MURRAY, Mr. C. A. ROBERTS and Mr. LESLIE M. ROBERTS, for plaintiff in error.

Mr. H. L. SHATTUCK, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is a suit wherein relief is prayed for by a bill of review. It was sought, in the court below, by this action, to reverse the decree in each of two certain cases in which

the plaintiff in the instant case was the defendant, and the defendant here was the plaintiff. The bill, as first filed, appeared to be based, at least in part, on newly discovered evidence, and, on motion of the defendant, was stricken from the files upon the ground that it was filed without leave of court. Thereafter the plaintiff moved to amend and to reinstate the bill, as amended. This motion was denied by the court. The plaintiff complains of this ruling, and to have the same reviewed, has sued out this writ of error.

The record does not show that leave of court for filing the bill had either been requested or obtained. It is not necessary to obtain leave of the court to file a bill of review to correct an error of law apparent on the face of the record; but such leave is necessary when the bill is founded on new matter, or newly discovered evidence. 16 Cyc. 523. Though a bill is brought for error of law it cannot be filed without leave if the application is *also* based on newly discovered matter. 4 Standard Enc. of Proc. 420; *Ricker v. Powell*, 100 U. S. 104, 25 L. Ed. 527.

It is not disputed that if the bill is other than one based solely on errors apparent, leave of court should have been first obtained, and that the striking of the bill, or the refusal to reinstate same after amendment, was not error. The plaintiff contends, however, that the bill as amended, or if amended as proposed, is one "based entirely upon error apparent upon the face of such judgments and decrees" which are sought to be reversed in this suit. The validity of this contention is the only matter necessary to be now considered.

The plaintiff's bill of review, considered with or without the proposed amendment, shows that in the former trials or proceedings, and in the decrees in question, the court adjudged a certain tax deed to be void, and that the decrees in this respect were based on the finding that: "The publisher of the newspaper in which the list of property and notice of sale for delinquent taxes for the year 1908 was published, failed to transmit to the county treasurer within

fourteen (14) days after the said notice was published a sufficient affidavit of said publication and because the amount for which the premises were sold at the sale of November of the year A. D. 1908, included the amount of the publisher's fee for said publication."

It is alleged in the bill that the publisher *did* in fact transmit a proper affidavit to the county treasurer within fourteen days after the last publication, as required by section 5709 R. S. 1908 (sec. 6422 M. A. S. 1912). In other words, it is claimed in the bill that the court committed an error in its finding, above mentioned, and that had it not been for such finding the tax deed would not have been held void.

Other allegations of the bill are to the effect that the error complained of may be shown "by the records in the office of the treasurer", which would prove, it is claimed, that the court was mistaken in its finding of fact concerning the transmission to the county treasurer of the publisher's affidavit.

It appears from the allegations of the bill, above referred to, that the alleged error complained of, assuming that it is an error of law, would be shown and made to appear, *not* by the pleadings and the decree, but by "the records in the office of the treasurer, or, in other words, by evidence. It is therefore not an error apparent on the face of the record. In 4 Standard Enc. Proc. 436, 439, it is said: "The error of law must appear upon the record itself, which consists, for this purpose, only of the pleadings and the decree passed in the cause. * * * The evidence is no part of the record. * * *"

The error complained of is really an error of fact. A bill cannot be based on errors of fact, nor for errors resulting from a wrong conclusion from the evidence. 16 Cyc. 527, 528. In 10 R. C. L. 571, sec. 360, it is stated in the text: "On a bill of review for error apparent, the court will not consider any error resulting from an erroneous inference of fact or conclusion from the evidence. The only questions open for examination in such a case are such questions of law as arise on the pleadings, proceedings and decree exclusive of the evidence." See also 16 Cyc. 528, 529.

Under the authorities above cited, the error complained of in the bill is not such an error as is reviewable as an error apparent of record. The plaintiff was not, therefore, prejudiced by the court's sustaining the motion to strike.

Furthermore, the bill contains matter which makes it one based, in part at least, on newly discovered evidence, since it is alleged, in effect, that by "search and inquiry of the records in the office of the said county treasurer" the evidence, showing that the decrees were erroneous, was discovered, and that it was discovered after the rendition of the decrees. The plaintiff's contention that it is a bill based *solely* on error apparent cannot therefore be sustained.

In *Ricker v. Powell, supra*, it was stated "that the right to file a bill of review without leave exists *only* when the bill is brought for error of law *alone*." Under this rule, there was no error in striking the bill from the files, or in refusing to reinstate it with the proposed amendment.

The judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9386.

EMPLOYERS' MUTUAL INSURANCE COMPANY v. THE
INDUSTRIAL COMMISSION OF COLORADO ET AL.

1. ACCIDENT INSURANCE—*Construction of Policy.* The policy requiring a cash deposit on a day named, and the payment of a premium at a later date, and providing that if any deposit was not made, or any premium not paid, within ten days of its maturity, the policy *ipso facto* lapsed. *Held* that both the deposit, and the payment of the premium were required, to the continuance of the policy.
2. PAYMENT—*Check Accepted by Mistake.* An accident insurance company made it a practice not to accept a delinquent check until examination made as to whether the insured had sustained an accident after his default. A clerk of the company by mistake sent the check to the bank for deposit, on the day

of its receipt. This was on Saturday, and upon the following Monday the company withdrew the check, and the amount thereof was charged against it by the bank. The check was returned to the person from whom it came. *Held* that the mistake of the clerk did not charge the company.

3. WAIVER OF DEFENSES—*An Act Done in Ignorance*, of the existence of facts which warrant the defense effects no waiver.

Error to Denver District Court, Hon. Neil F. Graham, Judge.

Department Two.

Mr. LEROY MCWHINNEY, Mr. L. WARD BANNISTER, Mr. SAMUEL M. JANUARY, Messrs. HUGHES & DORSEY and Mr. W. M. BOND, for plaintiff in error.

Hon. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Asistant, Mr. EDMUND J. CHURCHILL and Mr. EDWARD AFFOLTER, for defendants in error.

Mr. Justice Denison delivered the opinion of the court.

THE plaintiff in error brought suit in the District Court under §§ 78-82 of Chapter 179 S. L. 1915, to review the findings of the Industrial Commission against plaintiff in error upon a claim for the death of one LaSalle, who was killed by accident while in the employ of defendant, The Big Lake Fuel Company. The judgment was for defendant thus sustaining the commission's finding.

The sole question before the commission and the court was whether a certain policy issued by the Insurance Company was in force at the time of the accident. The Commission decided that it was in force.

The Commission's findings of fact are full and detailed. We are of the opinion that they do not justify the deduction that the policy was in force at the time of the accident but compel the opposite conclusion.

The policy was dated June 28th, 1916, and by its terms was to take effect from that date. It required a cash deposit at its issue, which was made, also another on July

1st. These deposits were to secure the payment of premiums. The policy required the first premium to be paid not until August 1st, because the amount thereof could not be ascertained until the pay roll of the employer for July, upon which the premium was computed, had been reported, and this premium paid for insurance for past time. By the terms of the policy, if payment of a deposit or premium was not made within ten days after its maturity the policy *ipso facto* lapsed, as of midnight of the last day of the calendar month before its maturity without notice to anybody. These provisions seem to have been necessary to prevent delay of premiums until after an accident. Neither the deposit due July 1st nor the premium due August 1st had been paid when the accident occurred.

LaSalle was killed about 2 p. m., Friday, August 11th, 1916. Afterwards, on the same day, the employer company drew a check falsely dated August 10th, on a Lafayette bank, for \$40.00, the amount of the required deposit, and mailed it to the Ralph W. Smith Agency Company, the insurance company's underwriting manager, who received it about 11 a. m., Saturday, August 12th, and immediately sent it to the treasurer of the insurance company. The practice of the company and the treasurer was to hold delinquent checks till an investigation showed that there had been no accident during delinquency. One Small, the treasurer's clerk, intending to follow this custom, nevertheless by mistake sent the check with other items to the Denver National Bank for deposit before noon on Saturday and did not discover the mistake till Monday morning. The bank gave the insurance company credit for the check. Monday morning, however, before the bank opened for business, Small, having discovered the error and learned of the accident, withdrew the check and the bank charged back the amount to the insurance company. The check was then returned to the employer company which drew it.

Having found the facts substantially as above, the commission finds "that the receipt of the check and the deposit

of said check in the bank constituted payment under the policy of the amount due thereunder and that the said policy was thereby continued in full force and effect."

The conclusion is impossible, in view of the previous findings, for several reasons.

1. The check was never accepted as payment. It was held pending investigation. The deposit in the bank was, according to the findings, a mistake; i. e., an involuntary act, which did not affect the situation one way or the other. The company did not intend to accept the check if the investigation should reveal an accident during delinquency, it did reveal it and the company returned the check.

2. The check is found by the commission to have been drawn to pay the second deposit. The premium due August 1st has never been paid. The payment of both is required by the policy. One is as important as the other. The failure to pay either automatically cancels the policy. The check cannot be regarded as a payment of both, as the commission seems to have thought, because it was not big enough and was not so intended.

3. The check was fraudulent, drawn after the accident, antedated with intent to deceive and sent in the hope that the company would accept it before it learned of the accident and so subject itself to the loss. Justice cannot sanction such a proceeding by giving the perpetrator the fruits of it.

Something has been suggested about waiver and estoppel, but the action of the insurance company could not amount to waiver, because it was done in ignorance of the accident and of the fact that the check had been drawn thereafter, nor to estoppel because the employer did not rely on it or even know of it.

There was some evidence of an oral variation of the policy, giving till July 28th to make the second deposit, but if true we do not think it competent, and even though both true and competent, it would not affect the result, because in any event the second deposit was delinquent when the check was drawn.

There is also some claim that since the first deposit was not made till July 7 and the binding receipt not issued till then, the effect of the provisions of the policy must be calculated from that day instead of from June 28th. Such claim is contrary to the policy itself and ignores the undisputed evidence that the employer especially requested and insisted that the policy become effective as of June 28th, and the binding receipt so reads.

The judgment should be reversed with directions to the district court to vacate, so far as the insurance company is concerned, the findings and award of the commission, and to direct the commission to dismiss the proceedings as to that company.

Garrigues, C. J., and Scott, J., concur.

No. 9842.

KING COPPER COMPANY ET AL. v. DREHER.

CORPORATIONS—*Foreign*, may not maintain an action in the courts of Colorado without complying with sec. 904 Rev. Stat. 1908. An action against an officer of the corporation who unlawfully detains its records is within the statute.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. HENRY HOWARD, JR., for plaintiffs in error.

Mr. A. E. MCGLASHAN, for defendant in error.

Mr. Justice Allen delivered the opinion of the court.

THIS is a suit in mandamus brought by the King Copper Company, an Arizona corporation, and C. E. Welch, as its general manager, secretary and treasurer, against W. F. Dreher, who is alleged to have been such officer of the corporation, and a writ is sought to compel the respondent to deliver to the petitioners, or either of them, certain books and papers.

The court below sustained a motion of the respondent for judgment on the pleadings, and the cause was dismissed. The petitioners have sued out this writ of error, and have applied for a supersedeas.

The principal question presented by the record, and the only one necessary to be considered upon this review, relates to the right of the petitioners to maintain this suit. It is admitted in the pleadings that the King Copper Company is a foreign corporation, and has never complied with the laws of Colorado entitling it to do business in this state, and that it has never paid the fees, charges and taxes prescribed and provided by the law of the state of Colorado to be paid to the secretary of state. The respondent therefore contends that the petitioners are, by section 904 R. S. 1908, barred from prosecuting this action.

Section 904 R. S. 1908 (sec. 1044 M. A. S. 1912; S. L. 1911, p. 255) after prescribing what fee shall be paid "to the secretary of state, for the use of the state" by every foreign corporation, provides, among other things, that "no such corporation shall be permitted to * * * prosecute or defend in any suit in this state until the said fee shall have been paid."

The petitioners contend that this statute cannot be invoked by the respondent for the reason that he is sued as an officer or agent of the corporation, and therefore estopped to plead the statute as a defense.

We cannot sustain this contention, but must hold that the statute is applicable, and bars the petitioners from prosecuting this suit. In *Watson v. Empire Cream Separator Co.*, 66 Colo. 284, 180 Pac. 685, it was said that until a foreign corporation complies with the law "it has no capacity to sue." In *Western Electric Co. v. Pickett*, 51 Colo. 415, 422, 118 Pac. 988, 38 L. R. A. (N. S.) 702, Ann. Cas. 1913A, 132, this court said that "the most efficient way to compel obedience to this statute is to enforce it as it reads, and not amend it by judicial construction."

The defense of non-compliance with the statute is available to an officer or agent of a foreign corporation, or to a person standing in a relation of trust to such corporation. In other words, the defense may be raised by any defendant. In *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989, the court, among other things, said: "It is expressly provided that 'no corporation which shall fail to comply with the provisions of this Act can maintain any suit or action, * * * in any of the courts of this state.' No limitations are expressed, and no exceptions can be implied. The corporation must comply with the law, or the courts of the state are closed to it. The statute expresses a clearly defined public policy. * * *" And in considering the right of an agent to rely upon the statute, the court says that his rights and obligations are matters of secondary importance in the face of the statute, and that "the doctrine of estoppel cannot be applied to enable a person or corporation to do what is forbidden by law." The rule laid down by the Minnesota case above cited was adopted by the Court of Civil Appeals in Texas in *Billingslea Grain Co. v. Howell*, 205 S. W. 671. To the same effect is *Boston Tow Boat Co. v. Sesnon Co.*, 64 Wash. 375, 116 Pac. 1083.

Under the language of our statute, and the authorities hereinbefore mentioned, the trial court committed no error in dismissing the suit. The application for a supersedeas is denied, and the judgment is affirmed.

Affirmed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9473.

REGENTS OF THE STATE UNIVERSITY AND ESTATE OF MACKY
v. ANDREW.

1. EXECUTOR—*Authority Before Probate.* Even before probate of the will the executor may employ an attorney to aid in securing moneys pertaining to the estate. Secs. 7103, 7138 of the Revised Statutes do not support a contrary resolution.

2. —*Employment of Attorney.* The executor may employ counsel to aid in the preservation of a private corporation in which the estate is largely interested.

The attorney's bill was reduced from \$17,000 allowed by the district court to \$10,000.

Error to Boulder District Court, Hon. J. C. Wiley, Judge.

Hon. VICTOR E. KEYES, Attorney General and Mr. EDWIN H. PARK, for plaintiffs in error.

Mr. T. J. O'DONNELL, Mr. J. W. GRAHAM and Mr. G. W. MUSSER, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THIS case involves the compensation of the defendant in error for legal services rendered to the executor of the above mentioned estate during its administration.

From the statement of facts by the plaintiffs in error, it appears that: "Before the filing of the executor's final report, it was the desire of the County Judge at Boulder to have the question of the executor's fees and the executor's attorney's fees settled as independent questions. Complying therewith the executor and the attorney therefore, each filed a statement of their claims, the attorney demanding the sum of \$20,000 in payment of services rendered. Instead of the executor making his final report, including therein the payment of attorney's fees and then having it allowed by the court, the above method was followed, which on the face of the record would appear to be a direct claim of the attorney against the estate rather than the allowance of the claim in favor of the executor, which in effect it is."

Upon the hearing in the County Court an allowance of \$11,000 was made to the attorney. An appeal was taken to the District Court where there was a trial to a jury, and verdict and judgment for \$17,000. It is this judgment which we are to review. It is stated that the value of the estate was about \$400,000.

It appears that defendant in error did not present an itemized claim, but upon his cross-examination he stated the various services for which he claimed compensation. Several prominent lawyers testified as to the value of the services to which defendant in error testified, their estimates ranging from \$15,000 to \$30,000. Plaintiffs in error offered defendant in error \$7,500 in full settlement of his claim, which offer was rejected. They now object that many of the services for which compensation is claimed were not chargeable to the estate. Since the verdict is general, we are unable to determine what the jury included in their verdict as matters for which compensation should be allowed. Inasmuch, however, as both sides have submitted the case to this court with a request that we fix the amount, we do not deem it necessary to examine all the items of service in detail. It is sufficient to say that at least two of the charges, each of considerable amount, are not subject to the objections made.

One of these charges was for assisting Wilson, who was named in the will as executor, in obtaining possession of a fund of \$116,420.03, before the will was probated. This sum was on deposit to the credit of "Snow and Macky" in a bank of which Macky had been president. It appears that no one knew of a firm of Snow and Macky, and Wilson had good reason to believe that the fund in fact belonged to the Macky estate. Acting upon this belief, under the advice and with the assistance of defendant in error, he procured from Mrs. Snow, a sister of decedent, a check in the name of Snow and Macky for said fund, and a disclaimer by her of any interest therein.

It is contended that Wilson had no right to take control of the fund pending the probate of the will, and that, in any event, he had no authority to employ an attorney in the matter. In support of these positions, counsel cite sections 7103 and 7138, Revised Statutes, 1908. The first of these sections authorizes the employment of counsel in case of a contest over a will offered for probate. This counsel assume excludes employment of counsel in any other case.

We see no reason for so construing it. Such construction is not required to protect the estate since the matter of fees to an executor, including his charges for legal assistance, is under the control of the County Court. If an executor has a duty to perform, in behalf of the estate, which requires legal advice, it would be unreasonable to deny it to him. The second named section provides that pending the probate of a will the power of the executor "shall extend to the burial of the deceased, the payment of necessary funeral charges, and the taking care of the estate." This is followed by a provision that, if the will be rejected, and the executor never qualify, he shall not "be liable as an executor of his own wrong, unless upon refusal to deliver up the estate," etc. We are of the opinion that the action of Wilson under the facts in this case was authorized by the statute. He was taking care of the estate in a very important matter.

Objection is made also to the attorney's charge for assistance to the executor in conserving the estate's interest in a gas company at Boulder. It appears that the estate held something like two-thirds of the capital stock of the company, and some of its bonds. Counsel for plaintiffs in error urge that these services in relation to the gas company are not to be considered because, they say, an executor has no right to carry on a business. But in this case the executor did not carry on a business. The gas company carried it on, and all that the executor appears to have done was to exert himself in behalf of the estate, under circumstances of considerable difficulty, to preserve the gas company, and so conserve the interests of the estate. If legal advice was necessary to that end, the executor was justified in securing it.

Inasmuch as all fees for necessary legal services are chargeable as an expense of administration, and as the matter of these fees were determined by the County Court, before determining the allowance to the executor for his personal services, it must be presumed that the court, which has a large discretion in these matters, knowing all the

facts as to the attorney's services, allowed him compensation directly, instead of adding it to the allowance to the executor. In other words, the executor's allowance was cut down by the amount to which the court found the defendant in error was entitled.

Acting upon the request of both parties that we fix the amount for which judgment should be entered, we reverse the judgment of the District Court, and remand the cause with directions to enter a judgment for \$10,000 in favor of defendant in error.

Reversed and remanded with directions.

Decision *en banc*.

No. 9847.

FRANKLIN ET AL. v. BARIAN.

1. JUSTICE OF THE PEACE—*Sitting for Another*, under Rev. Stat. sec. 3893, may try the cause; but if he fails to exercise this authority the justice by whose request he acts has not lost jurisdiction, and may proceed to judgment.
2. —*Appeal—Certiorari*. An appeal lies from such judgment. *Certiorari* thereto is not allowed.

Error to Montrose District Court, Hon. Thomas J. Black, Judge.

Mr. JOHN L. STIVERS and Mr. PAUL L. LITTLE, for plaintiffs in error.

Mr. HUGO SELIG, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error was defendant in an action before Franklin, a justice of the peace, and, judgment having gone against him, sued out from the District Court a writ of certiorari, alleging that said justice of the peace had exceeded his jurisdiction in the matter of the judgment.

A motion to quash the writ was overruled, and the judgment against defendant in error was set aside and held for naught. The respondents in that proceeding bring the case here on error.

It appears that the said Franklin, justice of the peace, before whom the cause against defendant in error was pending, was sick on the date of trial; that thereupon one Johnson, the nearest justice of the peace, was at the request of Franklin, called in to attend at the time and place fixed for trial, as provided by section 3893, R. S. 1908. He so attended and continued the cause. The record shows that Johnson several times, at the request of Franklin, continued the cause. The last continuance made by him was to February 4, 1920, at which date the cause was tried before Franklin; the defendant not appearing.

The motion to quash the writ of certiorari was made upon the ground that the petitioner had an adequate remedy by appeal.

For defendant in error, it is insisted that the cause was pending before Johnson and not before Franklin and that the record shows that the former was called in to try the cause. We do not so read the record. Its recitals are that each time, at the request of Franklin, the cause was continued. It is true that on one occasion, at the request of the plaintiff, Johnson directed summons to issue to bring in another defendant. That is the only action taken by him aside from the continuance. The statute gives him authority to try the cause, but as long as he did not attempt to exercise such authority, and as his record shows that he was at all times acting merely as a substitute for Franklin, there is no ground for the claim that Franklin had lost jurisdiction of the cause. We see no reason why the defendant's rights would not have been fully protected by appeal, and counsel suggests no such reason. There being a right of appeal, certiorari does not lie.

It appears then that it was error to issue the writ, and the judgment is accordingly reversed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9849.

BAGOT v. BAGOT.

DIVORCE—Alimony. The wife's application for alimony pendente lite is not barred by a decree in a former suit in which she was convicted of cruelty to the husband.

Error to Denver District Court, Hon. Clarence J. Morley, Judge.

Application for Supersedeas.

Mr. CHARLES H. PIERCE, for plaintiff in error.

Mr. HENRY E. MAY, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THIS cause is before us on error to the District Court to review a judgment awarding the defendant in error, plaintiff in an action for separate maintenance, temporary alimony and suit money, *pendente lite*.

To a petition for said allowance an answer was filed setting up the record of a cause in the District Court, between the same parties, in which each was adjudged guilty of cruelty toward the other. This record, it is contended, constitutes a bar to the allowing of suit money or temporary alimony, since it shows, as counsel says, that the plaintiff does not come into court with clean hands, a prerequisite to a standing in a court of equity.

The brief of plaintiff in error contains numerous citations from opinions rendered in divorce actions, but fails to notice the difference between the right to alimony generally, and the right to temporary alimony and suit money pending the trial of the cause. The distinction is fundamental.

The order or judgment under review was in "an intermediary proceeding" in which the pleadings seek relief distinct from that for which the main suit was brought. It is for this reason held to be final, in such a sense as makes it an appealable order. *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657. Manifestly, then, in determining this

question the court cannot consider the merits of the case. Temporary alimony and suit money are allowed a wife, who is suing her husband, to put her on equality with him so that she may prosecute her action, and have means of living while so doing.

In *Daniels v. Daniels*, *supra*, this court, in discussing this proceeding said: "The rule in all cases is based upon the existence of the marriage relation, the ability of the husband, and the destitute circumstances of the wife. If the wife presents such a case against her husband as *prima facie* entitles her to relief, the rule is that she should be supplied with the necessary means to prosecute her suit on an equal footing with her husband; also, if she be destitute of the means of subsistence, and the husband is possessed of means to relieve her necessities, it is the duty of the court, when called upon, to award a reasonable allowance for this purpose. A proper showing should be made by the wife to entitle her to such an order. Her petition praying for such temporary alimony should be verified and supported by affidavits; but the merits of the original or main controversy cannot be inquired into. The essential facts to be established are, as before stated, the existing marriage relation of the parties, the present destitution of the wife, and the financial ability of the husband. If the wife is in fact destitute of the means of support, it is immaterial, so far as the application for temporary alimony is concerned, what brought about her destitute condition. The only questions upon which the husband can be heard are his own means and the means of the wife."

Were the theory of plaintiff in error correct, the wife would be called upon to litigate the case on its merits in a proceeding in which she sought to obtain from her husband the means to carry on such litigation, and without which, the hypothesis is, she cannot litigate at all. The record establishes the fact that the plaintiff in the action has no means, and that the amount allowed is not excessive in view of the admitted financial ability of the defendant. The judgment is accordingly affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9813.

PERINI v. CONTINENTAL OIL COMPANY

1. CORPORATION—*Annual Report*. A report containing no statement of any indebtedness as owed by the corporation was filed on February 28. *Held* not a compliance with the statute.

The report should be filed within reasonable time after its preparation, the time depending upon the circumstances of each case.

2. —*Former Default*, by a corporation in filing an annual report, is no bar to the creditor's action against a director, counting upon a later default.

*Error to Denver District Court, Hon. Julian H. Moore,
Judge.*

Application for Supersedeas.

Messrs. LILYARD & SIMPSON, for plaintiff in error.

Mr. JOHN HORNE CHILES, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

DEFENDANT in error brought an action against plaintiff in error to recover the amount of certain debts contracted by The Capital Hill Garage Company, of which plaintiff in error was one of the directors, during the year 1916 and prior to the 6th day of October of that year.

Plaintiff in the action sought to have the defendant made personally liable for said debts because of an alleged failure of the corporation to file its annual report within sixty days after January 1, 1917. This report is dated February 27, 1917, and was filed February 28, 1917. Under the sixth head in a blank provided by the Secretary of State, which reads "Amount of indebtedness at date of filing this report \$—————" no statement whatever was made. Under the eighth heading, which reads: "Eighth. Such other information as will show with reasonable fullness and certainty the condition of real and personal property, and the financial condition of your company at the date of filing this report"; a trial balance was set out showing accounts

payable \$3,163.63. The trial court found for the plaintiff, and the defendant brings error.

Whether or not the report filed is sufficient in form need not be determined, since we are of the opinion that a statement of the indebtedness, on January 1st, though unobjectionable as to form, not filed until February 28th, does not meet the statutory requirement. We agree with counsel for plaintiff in error that it would be unreasonable to construe the words "at the date of filing said report", as requiring a statement of indebtedness on the very day of filing. That would be impracticable, if not impossible for corporations at any considerable distance from the capital.

The report should state the indebtedness on the day the report is made, and the filing should follow immediately. That is, the report should be filed within a reasonable time, such time depending upon the circumstances of each case.

Plaintiff in error, however, contends that if the report for the year 1916, filed in 1917, is defective, so also was the report for the preceding year, it having been dated February 14, 1916, and filed February 26th of that year. Assuming that the report filed in 1916 was defective because of the unreasonable delay in filing it after it was made and verified, it is counsel's contention that under the decisions of this court in *Dart v. Hughes*, 49 Colo. 465, and *Thatcher v. Salomon*, 16 Colo. App. 150, the offense of the directors was complete on March 2, 1916; that the statutory limitation of one year then began to run, and at the end of a year thereafter the bar was complete. Counsel's position is that when once directors, by failing to file a report, have become subject to the statutory penalty, and the period of one year has elapsed after the right to a penalty accrued, the resulting bar applies to all contracts made thereafter, even in subsequent years.

This cannot be a proper interpretation of the decisions cited. No such question was involved in either of them, and if counsel is correct, when once the directors had defaulted in their statutory duty in the respect noted, and suit had not been brought against them for a year, they would

thereafter be immune from attack under the statute, though the corporation never filed another annual report.

In *C. F. & I. Co. v. Lenhart*, 6 Colo. App. 511, it was held that a creditor can not waive a default of a corporation in not filing a report in a previous year, and thus postpone the beginning of the statutory period of limitation. That being so, it would be unfair to permit defendants to take advantage of their default in one year to protect themselves from the penalty for subsequent defaults.

The evident purpose of the law is to require and enforce the filing of these reports annually, for the benefit of parties dealing with the corporations. The interpretation suggested by counsel would defeat the plain intent of the law.

It is further urged that as this is an action for a penalty, there is no right of recovery upon an assigned claim. In *Credit Men's Co. v. Vickery*, 62 Colo. 214, that question was decided adversely to said contention.

We find no error in the record, and the judgment is accordingly affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

September Term, 1920

No. 9562.

PEOPLE EX REL. NATIONAL SURETY CO. ET AL. v. SHUMATE,
DISTRICT JUDGE.

1. *JUDGES—Order Without Notice.* An order made without notice, calling another judge to preside at a trial, if it be regarded as under code sec. 31 concerning change of venue, is without effect, even though made on the court's own motion.
2. *Calling Another Judge.* An order inviting the assistance of another judge under sec. 1478 R. S. 1908, is revocable at any time before the invited judge takes charge.

Mr. T. J. O'DONNELL, Mr. G. W. MUSSER, for petitioners.

Mr. CHARLES W. TAYLOR, Mr. S. N. WHEELER, Mr. J. W. DOLLISON, Mr. S. HARRISON WHITE, for respondent.

En banc.

Mr. Justice Denison delivered the opinion of the court.

THE respondent was judge of the district court of the ninth district.

IN the case of The Board of County Commissioners of Garfield County v. Sheely and The National Surety Company, pending in that district, it was suggested to him that he was prejudiced and that a motion would be made for another judge. Afterwards one of the attorneys for the defendant company, as appears in an order entered February 13, 1918, requested him to waive the motion and call another judge without it. He consented to do this and in October or September, 1917, requested another judge to act, having announced to counsel for plaintiff that that would be done and his reasons for so doing, and the other judge consented.

February 13, 1918, without notice to defendant's attorneys, he entered an order "that the order heretofore made requesting" another judge to act be rescinded, and ordered defendants to make a motion and showing as to his prejudice.

The defendants now move for a writ of prohibition on the ground that the order calling another judge was made under § 31 of the code, was equivalent to a change of venue, and deprived the respondent of further power in the case.

On the other hand it is urged that the calling of another judge was a mere request under R. S. Sec. 1478, which could be revoked at any time, that it was revoked, and that in any event it deprived the respondent of no power over the case.

There was no notice of motion to change venue and no appearance against it and we do not find anything in the record constituting a waiver.

An order without notice is without effect.

Manning v. The People, 66 Colo. 249, 180 Pac. 748; *S. C. Chamberlin v. People*, 66 Colo. 249, 180 Pac. 748, consequently, the order calling another judge, if it be regarded as

under the code § 31, was without effect even though made on the court's own motion. If it be regarded as under Rev. Stat., § 1478, it was revocable at any time before the invited judge took charge. It was revoked.

It follows that the respondent judge did not lose jurisdiction over the case, and the writ of prohibition must be denied.

If the relators, defendants in the case below, desire to raise the question of the propriety of the further consideration of the case by the respondent, they can do so by motion with proper notice. Rule to show cause discharged.

No. 9736.

JONES v. BOYER.

1. REAL ESTATE BROKERS—*Commission*. A broker employed to procure a purchaser for real estate earns his commission when, through his efforts, a purchaser meets the employer and a sale is made to him.
2. TRIAL—*Remarks of the Court*. Informal and desultory remarks of a judge at the close of argument are not findings of fact properly so called, and have not the force of a special verdict.
3. APPEAL AND ERROR—*Judgment*. A judgment will not be disturbed by the appellate court, if there is evidence to justify it.

Remarks of the Court—Bill of Exceptions. Informal remarks of the court made in passing judgment, are not made findings by so denominating them in a bill of exceptions.

Error to the District Court of Arapahoe County, Hon. S. W. Johnson, Judge.

Mr. JOHN H. GABRIEL, Mr. LUKE KAVANAUGH, for plaintiff in error.

Mr. CHARLES H. PIERCE, Mr. HARRY S. CLASS, for defendant in error.

Department Two.

Mr. Justice Denison delivered the opinion of the court.

BOYER brought suit against Jones for a commission on a sale of real estate, Tuileries Park, in Englewood. The case was tried to the court and plaintiff had judgment. The only question before us is whether there is sufficient evidence to support the judgment.

Boyer testified that he was a curbstone broker, that he saw Jones, the owner of the property, in a barber shop; that he introduced himself to Jones and the following conversation took place: "Are you the owner of the park?" "Yes, I am." "Is it for sale?" "It is." "I would like to get the selling of the park; I think I have got a prospective buyer." "Who is it?" "Mr. Woodward is the man. He is connected with the Film Company." "What is the Film Company?" "It is a place to produce moving pictures; I think it is a good, ideal spot for it." "All right, if you can sell it, go ahead and sell it." "I will try and have Mr. Woodward out tomorrow afternoon or tomorrow morning. I should say at ten o'clock." "All right, go ahead."

Plaintiff further testified that shortly afterwards, outside the barber shop, he said to Jones, "Mr. Jones, if I get this sale through, I expect the usual commission." That Jones replied, "That will be all right, go ahead."

This testimony is sufficient to justify a finding that plaintiff was employed to find a purchaser.

The evidence is undisputed that he afterwards told one O. D. Woodward of the property and its suitability for use in making films and that in consequence Woodward went to see it and Jones and ultimately bought the land. This makes a case for a commission. A broker employed to procure a purchaser has earned his commission when through his efforts a purchaser meets the employer and a sale is made to him.

Plaintiff in error makes the point that the court has found facts that are inconsistent with the plaintiff's evidence of employment and make a finding that there was an employment impossible; but there are no findings properly so-called. The judge, as judges often do, after the argu-

ments had been made, discussed the case at length, but his remarks, as is usual in such cases, were informal and desultory, consisting mostly of comments on the evidence and the witnesses, and we cannot regard them as of the force of formal findings, prepared as a basis for a judgment; there is nothing to indicate that they were so regarded by the judge.

Such remarks may perhaps be called an opinion, but are not findings of fact, properly so-called and have not the force of a special verdict, 38 Cyc. 1960. An example of formal findings of fact may be found in *Larimer etc. Co. v. Wyatt*, 23 Colo. 480, 483.

Since there is enough evidence in plaintiff's favor to justify the judgment we must let it stand.

We are not to be understood as saying that even if the remarks of the Judge were to be regarded as findings they would not consist with the judgment; neither have we overlooked the fact that these remarks are called findings in the bill of exceptions, but that does not make them so.

Supersedeas denied and judgment affirmed.

Garrigues, C. J., and Scott, J., concur.

No. 9591.

KOBAY v. BOARD OF COUNTY COMMISSIONERS OF PITKIN CO.
ET AL.

1. PLEADING—*Improper Parties*. Where an action is brought against the county commissioners to compel the doing of an act which can only be performed by the county treasurer under the statute, the treasurer not being joined as a party, a general demurrer to the complaint was properly sustained.
2. TAXATION—*Assignment of Tax Certificates*. Section 6439 M. A. S., 1912, confers upon the board of county commissioners authority to determine the sum at which a tax certificate, belonging to the county, may be sold, but leaves the duty of making the assignment of certificates to the county treasurer.

Error to the District Court of Pitkin County, Hon. John T. Shumate, Judge.

Mr. THOMAS A. RUCKER, Mr. HARRIS KOBAY, *Pro se.*, for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error brought suit against defendants in error alleging in his complaint that the defendants, the Board of County Commissioners, had offered for sale certain tax certificates belonging to Pitkin County, and had accepted his bid therefor, and that he made payment to the County Treasurer of the amount of his bid. That before said certificates had been assigned to him, the defendant in error, Jewett, bought said certificates from the County Treasurer and paid therefor the full amount of taxes then due.

Plaintiff prays for an order directing the certificates of purchase to be assigned to him, an injunction to prevent the issue of a tax deed by the County Treasurer to defendant, Jewett, and that, if said deed be issued before a final hearing of the action that the tax deed be set aside, and for general relief. A general demurrer to the complaint was sustained and the plaintiff, having elected to stand upon his complaint, has brought the case here on error.

There is no brief filed in behalf of defendants in error or any of them. We are, therefore, not advised as to what the trial court considered lacking in the complaint. On the face of it, however, it appears that plaintiff was seeking relief against parties who had no authority to grant it.

Under Section 6439 M. A. S., 1912, the County Treasurer is authorized to sell, assign and deliver tax certificates issued to the county, upon payment to the Treasurer of such sums as the Board of County Commissioners may decide. Here the County Treasurer is not made a party, though he is the only person who could give plaintiff relief.

In *Empire Ranch and Cattle Co. v. Neikirk*, 23 Colo.

App. 392, 128 Pac. 468, it is held that the above section confers upon the Board of County Commissioners authority to determine the sum at which the certificate may be sold, but leaves the duty of making an assignment of certificates in the hands of the County Treasurer. Further, that the commissioners may not take from the County Treasurer the duty imposed upon him by statute, and thus deprive him of the statutory fee for making the assignment.

Plaintiff, not having presented a case against the defendants, or either of them, which entitled him to any relief, the general demurrer to the complaint was properly sustained. The judgment is accordingly affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9592.

KOBAY v. BOARD OF COUNTY COMMISSIONERS OF PITKIN CO.
ET AL..

ADJUDICATED CASES—This case is substantially the same as *Kobay v. Commissioners*, No. 9591, and follows the decision therein.

Error to the District Court of Pitkin County, Hon. John T. Shumate, Judge.

Mr. THOMAS A. RUCKER, Mr. HARRIS KOBAY, *Pro se*, for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error brought an action against the defendants in error alleging a sale to him by the Board of County Commissioners of Pitkin County of certain tax certificates, a tender by him to the County Treasurer of the purchase price of said certificates, and the refusal of said treasurer to accept the same.

It is further alleged that the defendant, Erickson, after the purchase by plaintiff, purchased the said certificates of the said Board, and that the said certificates were thereupon assigned to said Erickson.

The prayer for relief was substantially the same as that stated in the case of *Kobey v. Board of County Commissioners and Jewett, supra*, 192 Pac. 502. The general demurrer to the complaint was sustained. Plaintiff elected to stand upon his complaint and has brought the case here for review. The complaint was deficient for the reasons stated in the opinion in the case last mentioned. The judgment is accordingly affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9604.

HALLETT, ET AL. v. THE POST PRINTING AND PUBLISHING COMPANY.

1. *SCHOOLS—Powers of Board of Directors.* May exclude pupils who do not meet reasonable health requirements; may take expert advice as to what these requirements should be; may employ suitable persons to make inspections and give advice as to physical condition and training.

But physical examinations should not include medical or surgical treatment.

2. *Statutes—Construed.* Section 5925, R. S. 1908, providing for the employment of "teachers, mechanics and laborers" does not restrict a school board to the employment of such persons only.

3. *Statutes—Construed.* Chapter 203, S. L. 1909, providing for the yearly inspection of pupils by inexperienced principals and teachers, does not forbid adequate inspection by experts and was not intended as a complete system to supersede the board's power to protect and physically educate children.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. WILLIAM H. GABBERT, Mr. F. W. SANBORN, Mr. HERBERT M. MUNROE, for plaintiffs in error.

Mr. JOHN A. RUSH, Mr. FOSTER CLINE, for defendant in error.

En banc.

Mr. Justice Denison delivered the opinion of the court.

THE court below granted an injunction against plaintiffs in error, who are the president, secretary and treasurer of the School Board of Denver, forbidding them to issue warrants for the maintenance of the "School Health Inspection Department", which the board had established and in which it was employing doctors, dentists and nurses, on the ground that such maintenance was beyond its lawful powers.

The power of the school board to exclude pupils who do not meet reasonable health requirements, which is undoubted, necessitates the conclusion that they have power:

1. To make the requirements, and therefore to take expert advice as to what those requirements ought to be.
2. To determine whether the pupil meets them, which requires expert advice and inspection, and therefore they may employ suitable persons to give such advice and make such inspection.

The fact that in small districts this may be impossible is immaterial.

It is also undoubted that the board may provide for the physical as well as the mental education of the pupils. It follows that, if they provide physical education, they must, within reasonable limits as to expense and time of pupils, provide for determining what is proper and beneficial for each pupil, by all reasonable means, including examination, physical as well as mental, by suitable persons, and for proper physical exercises and development to overcome defects.

This should not include medical or surgical treatment for disease. That would be to make infirmaries or hospitals of the schools.

The fact that the persons employed are professional medical men and nurses does not preclude but justifies their employment for such a purpose.

If the board were restricted by R. S. § 5925 to the em-

ployment of "teachers, mechanics and laborers" claimed by the defendant in error, it could no lawyer, architect, clerk, secretary, bookkeeper engineer (civil or stationary) or even a supe and, further, if employes are inspecting the cl directing what is to be done for their physical they are as certainly teachers as are those pi large schools who do not actually teach.

As to S. L. 1909, Ch. 203, it is claimed that act provides a complete system of health ins schools, school boards cannot lawfully do more. ination of the act, however, discloses no purp part of the legislature to provide a complete sy spection or to restrict school boards in any way.

The act provides for a yearly inspection by incipals and teachers, of sight, hearing and brea and that without drugs or instruments, at an pense of \$1,000 for the whole state.

We are asked to hold that the provision fi spection forbids adequate inspection by experts.

We ought not to impute absurdity unnecessary: not absurd to require such inspection as a min perhaps, to forbid the inexperienced to use instrumen inefficient their inspection might be without tl the legislature should go to the length of establ inspection as the maximum of what might lawfi for the health of the public school children, w be absurd?

Section 2 requires no inspection at all; not fo disease, physical education, hygiene, personal nor for any police purpose. It merely requires and teachers to report what is apparent.

It is not possible that this act was intended as system to supersede the board's power to 1 physically educate the children.

The provision of the constitution for free scl from six to twenty-one years of age did not pi

schools for those under six. In *Re Kindergarten Schools*, 18 Colo. 234, 236, 32 Pac. 422, 19 L. R. A. 469.

Why, then, does a provision for inspection of sight, hearing and breathing preclude inspection for measles or curvature of the spine?

The fears that school districts will be loaded with unnecessary and expensive experts are groundless. The same argument would apply to teachers, mechanics, laborers and principals. The people of the district can always control the whole matter by changing the board.

The judgment should be reversed.

No. 9584.

PETERSON, ADM'R v. DANIELS ET AL.

1. CORPORATIONS—*Discharge of Receiver*. A judgment creditor is entitled to the discharge of the receiver of a debtor corporation where it appears that at the time of the institution of the receivership proceedings, the company was solvent and conditions were such that the appointment of a receiver was unwarranted.
2. RECEIVERS—*Discharge—Estoppel*. Creditor of a corporation is not estopped from asking for the discharge of a receiver of the company, where he recognizes the receivership by moving for an order requiring the filing of an inventory and applying for a transfer of unincumbered personal property, where it appears that he did not have full knowledge of the facts and conditions and the circumstances were not such as to conclusively impute to him such knowledge.
3. APPEAL AND ERROR—*Refusal to Discharge Receiver Final Order, When*. Ordinarily the overruling of a motion to discharge a receiver is interlocutory and not appealable, but the rule depends on circumstances. Where the petitioner was a judgment creditor, clearly entitled to the relief asked, and the denial of his petition in effect precluded him from collecting his judgment, the order of denial was held, as to him, final and appealable.

Error to the District Court of Boulder County, Hon. Neil F. Graham, Judge.

Messrs. MORRISON & DE SOTO, for plaintiff in error.

Mr. CARLE WHITEHEAD, Mr. ALBERT VOGL, for defendants in error.

Department One.

Mr. Justice Burke delivered the opinion of the court.

THE plaintiff in error is hereinafter designated as "Petitioner"; the defendant in error, Daniels, as "Trustee"; The Big-Five Mining Company as the "Company"; and defendant in error, H. S. Sanderson, receiver, as "Receiver".

Petitioner, having obtained a judgment in the sum of \$4,826.75 in the United States District Court against the company, caused execution to be issued thereon August 7, 1918. Prior to its levy, and on August 14, 1918, plaintiff filed his complaint against the company, seeking the foreclosure of a trust deed (hereinafter so called, but which instrument, in fact, also included personal property thereafter to be acquired), securing a bond issue of \$250,000. Although this complaint did not disclose the fact, there were then outstanding not to exceed \$92,000 of these bonds. The complaint set forth the insolvency of the company, that its property was being neglected and left uncared for, and its rents and profits in danger of being damaged and impaired. Summons was issued on the day the complaint was filed. The company answered admitting the allegations of the complaint, a receiver was appointed, all the property of the company turned over to him, all persons were enjoined from bringing any action against the company, or executing any judgments already obtained, and the receiver was authorized to continue the business. The summons bore date, and showed acceptance of service, August 10. Petitioner thereafter moved for an order directing the receiver to file an inventory, which motion was granted. He also filed his petition praying that personal property in the receiver's hands, and not covered by the trust deed, be applied

to the satisfaction of his execution. This the court denied "at this time, without prejudice, to such relief as may be determined in pursuance of these findings upon the final hearing herein or during the progress of the foreclosure case", etc.

February 4, 1919, petitioner filed his "supplemental petition" in which he sets forth newly acquired information, on the ground of which he asks the discharge of the receiver. These facts are: That the company was solvent at the time of the appointment of the receiver; that the receivership was the result of collusion between the plaintiff and the company for the purpose of defeating petitioner's judgment; that the unpaid debt does not exceed \$92,000; that no foreclosure is intended; that the receiver's inventory conceals personal property more than sufficient to pay petitioner's judgment, and that no change in the management or conduct of the company had occurred under the receivership. Plaintiff's answer to this petition put these allegations in issue and alleged, *inter alia*, that petitioner's judgment was worthless and that the company had no assets from which the same could be paid. A hearing was had on this supplemental petition, relief thereunder denied, and the petition dismissed. Motion for a new trial was dispensed with by order of the court and time fixed for bill of exceptions.

On these hearings it clearly appeared that at the time of the institution of the receivership proceeding the company was solvent; that not more than \$92,000 of these bonds were outstanding; that the company had money in bank and credits receivable sufficient to pay petitioner's judgment, but which, by reason of the receivership proceeding, he was unable to subject to the lien of his execution; that there was no change in the management of the company under the receivership; and that at the time of the filing of the original petition there was nothing to put petitioner on notice that the receivership proceeding was not in good faith, or that the whole issue of bonds was not still outstanding and unpaid.

Burke, J., after stating the case as above.

The facts in this case, admitted and proven such as to entitle petitioner to the discharge of the receiver provided he had not, as is here contended, waived that right, or sued out this writ prematurely.

It is said that petitioner's recognition of the receiver (by moving for an order requiring the filing of a return, and by making application for a transfer of encumbered personal property) will now estop him from testing it. High on Receivers, 4th Ed., p. 58, and other authorities, are cited to sustain this position. The court, however, ignores the first element of all estoppel, that the person estopped acted with full knowledge of the circumstances which must be conclusively held to be such knowledge. That element is lacking in the present case.

It is said that the order of the trial court sustaining the receiver is not a final judgment, citing 23 R. C. L. and other authorities. Ordinarily, as between the action, the overruling of a motion to discharge the receiver is interlocutory and not appealable. This may, however, as in the case before us, depend upon the circumstances. Here petitioner was clearly entitled to the discharge of the receiver. This was denied and his petition for discharge was overruled. The proceedings thereafter clearly show that this order was then considered by the trial court and the parties as a final judgment. That it is so we do not doubt. The receiver had been appointed for a solvent corporation which petitioner was entitled to have the assets of the corporation held subject to the lien of his execution. These assets petitioner was entitled to have reach in the hands of the court's officer. No order had been made, or was being made, to wind up the corporation's affairs, or pay its debts. Its management was inefficient and its affairs were in a state of confusion. Its inefficiency was assigned as one of the grounds for its removal. Its receivership, had not been changed thereunder. Its judgment was alleged to be worthless for lack of assets with which to pay it. No termination of these proceedings was promised, or prospective. The order was then

all practical intents and purposes, a final judgment as to petitioner.

The judgment is accordingly reversed with directions to the trial court to discharge the receiver, and for further proceedings in harmony with the views herein expressed.

Garrigues, C. J., and Teller, J., concur.

No. 9585.

LANG v. DANIELS ET AL.

1. FORMER DECISION. Action of the appellate court in the case of *Peterson v. Daniels* makes it unnecessary to determine the questions raised in this case.

Error to the District Court of Boulder County, Hon. Neil F. Graham, Judge.

Messrs. MORRISON & DESOTO, for plaintiff in error.

Mr. CARLE WHITEHEAD, Mr. ALBERT VOGL, for defendants in error.

Department One.

Mr. Justice Burke delivered the opinion of the court.

THE defendants in error are the same as in case No. 9584 this day decided. The plaintiff in error is a stockholder in the defendant company, appearing for himself and other stockholders, and asking for the discharge of the receiver on the ground that the receivership was collusive.

Some of the questions here raised are identical with those in 9584, above mentioned. The relief here sought, i. e., the discharge of the receiver, having been ordered in the former case, all necessity for the discussion of any of the questions herein raised is obviated. The judgment is accordingly reversed.

Garrigues, C. J., and Teller, J., concur.

No. 9697.

KINGSBURY & CO. v. RIVERTON-WYOMING REFINING CO.

1. **WORDS AND PHRASES**—*"Proceeds."* The word must be interpreted from the context of the writing in which it is used, and the circumstances of the case.
 2. **CONTRACTS**—*Construed.* "Proceeds", in a contract providing "on the basis of 60 per cent net to the treasury of your company of all stock sales," construed to mean money paid for stock.
 3. *Recovery under.* But a broker under such a contract, where he is to receive 40 per cent of the "proceeds", is not prevented from recovering for the value of his services, if any, for the sale of stock issued in payment for property or services.
 4. **DEBTOR AND CREDITOR**—*Indebtedness.* A creditor can not lawfully pay himself with a debtor's money without the debtor's consent and when a debtor delivers him money for a purpose which negatives the idea of payment, the creditor's control is limited to the purpose declared.
 5. **CORPORATIONS**—*Transfer of Stock.* Officers of corporations in transferring shares of stock and issuing certificates, act in a ministerial capacity.
- Indebtedness to.* Officers cannot appropriate the shares of a stockholder of record, who chances to be indebted to the corporation; they can reach his interest only by statutory proceedings, and a refusal to transfer the shares at the request of the stockholder has been held a conversion.
6. **DAMAGES.** A stockholder in a corporation is entitled to at least nominal damages for the refusal of the officers to transfer his stock as requested.

Error to the District Court of the City and County of Denver, Hon. C. J. Morley, Judge.

Mr. J. W. KELLEY, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error brought suit against the defendant in error for an accounting, under a contract between the

parties, by which the plaintiff undertook to sell the capital stock of said company in consideration of 40% of the proceeds received from all stock sales. Plaintiff claimed that he was entitled to a credit equal to 40% of the value of certain lands, and other property, taken in exchange for stock.

For a second cause of action, he claimed a right to recover the amount of a check which he had given to the company for stock, which he had sold to one Carwin, which check the company accepted and cashed without delivering the stock certificate.

For a third cause of action, plaintiff alleged that he has been damaged by the refusal of defendant to transfer to his vendee certain shares of stock, which he owned.

Defendant, by answer, denied that there was anything due to the plaintiff on the first cause of action. In answer to the second cause of action, the defendant admitted that the plaintiff paid to the defendant the sum of money in the complaint alleged; and that the plaintiff requested the issue of a certificate for said money; and alleged that thereafter a certificate issued as requested, which was retained by the defendant as collateral security for a promissory note of said Carwin, then held by defendant.

In answer to the third cause of action, defendant denies that it has in its possession any capital stock belonging to plaintiff, alleging that the stock in question had been levied upon by virtue of a writ of attachment, which writ was still in force.

On the first cause of action, the court found for the defendant. On the second cause of action, a non-suit was entered. On the other causes of action, only one of which is material to this decision, the court found for the defendant. On the defendant's cross-complaint the court found in its favor in the sum of \$4,305.03 which, with interest, amounted to \$4,654.00, for which sum judgment was entered in favor of the defendant. Plaintiff brings error. There is no appearance for the defendant in error.

It is insisted that plaintiff in error is entitled to a com-

mission of 40% on certain shares of stock issued by the company under contracts, made by him, for land and other property; this for the reason that the word "proceeds", used in the plaintiff's proposition, should be interpreted as including whatever was received in payment for stock. The rule is, that the word must be interpreted from its context and the circumstances of the case. Plaintiff's proposition, which, having been accepted, he makes the basis of his claim, was an offer to sell stock for the company. "On the basis of 60% of the proceeds net to the treasury of your company on all stock sold at One Dollar per share and less, we to pay all costs of selling, including advertising, printing, postage, etc., and your treasury to receive the full 60% of the proceeds of such sale. This arrangement to continue until the stock shall reach the market price, and is sold at One Dollar per share. But it must be understood and agreed that if thereafter stock shall be sold by us at more than One Dollar per share, the balance over and above Sixty Cents per share shall belong to us, and that it shall be necessary for us to account to your company for only Sixty Cents a share thereafter." This evidently limits the meaning of "proceeds" to money paid for stock. In *Andrews v. Johns*, 59 Ohio St. 65, 51 N. E. 880, it is held that the term "proceeds" when used in connection with "sale" means a sum of money derived from such sale. To the same effect is *Wisdom v. Wilson*, 59 Tex. Civil App. 593, 127 S. W. 1128. The contract did not cover an exchange of stock for property. This, however, does not prevent the plaintiff recovering for the value of his services, if any, in the sale of stock issued in payment for property or services. Upon a retrial of the cause, he should be permitted to amend his complaint, if he so desires, to present that question and have the matter tried.

The finding on the second cause of action seems to have been made under a mistake as to the evidence, the court stating that plaintiff had testified that he owed Carwin; that the money remitted for the stock was in fact a payment on plaintiff's debt to Carwin, hence Carwin's money.

From this the court concluded that if anyone had a right to recover, it was Carwin. The record does not so show. On the contrary it is clear that Carwin owed plaintiff, but that fact is not important. Whether plaintiff paid defendant his own money to get shares for Carwin, or money due to Carwin on earned commission, upon which question the testimony is not clear, is immaterial. It was paid with specific directions for its application, and the defendant had no right to apply it in any other way. The person making payment has the right to direct its application. "A creditor cannot lawfully pay himself with the debtor's money, without the debtor's consent, either express or implied; and when the debtor delivers his money for a purpose which negatives the idea of payment, the creditor's control is limited to the purpose declared." *D. H. & S. W. R. R. Co. v. Smith*, 50 Mich. 112, 15 N. W. 39.

When plaintiff sent the money to defendant he directed it to be applied in payment for shares, a certificate for which was to be sent him. Under those circumstances, the defendant was bound either to issue the certificate and deliver it, as requested, or to return the money remitted in payment therefor. The court found for defendant on the third cause of action, on which damages were sought because of the defendant's refusal to transfer shares owned by the plaintiff. We find no evidence whatever to support this finding. The answer admitted that plaintiff was the owner of 22,464 shares, but alleged that a writ of attachment was levied upon said stock on September 5, 1918. The plaintiff in the attachment suit was the president of the defendant corporation.

Plaintiff's undisputed testimony was that long before the attachment he demanded that the shares be transferred to two persons named, to whom he had agreed to transfer them; that the defendant then refused to make such transfer; and that suit was brought against him by said purchasers for failure to transfer the stock to them as agreed.

Officers of corporations in transferring shares and issuing certificates act in a ministerial capacity. *Valley View Min-*

ing Co. v. Whitehead, 66 Colo. 237, 180 Pac. 737. They cannot appropriate the shares of a stockholder of record, who chances to be indebted to the corporation, unless the corporation has, by charter or authorized by-law, a lien for the debt. They can reach his interest only by pursuing the statutory proceedings, the same as is required of other creditors. When requested by the owner of shares to transfer them they must follow his instructions. The shares were the property of plaintiff, and refusal to transfer them on his request was a violation of his rights. Such refusal has been held a conversion. *Gorham v. Massillon Iron Co.*, 284 Ill. 594, 120 N. E. 467. The plaintiff was entitled, in any event, to nominal damages. The finding against him on that issue was error.

Except as to the matters above discussed, there is no complaint of the findings of the court. On the matter of the accounting, it will not be necessary to take further evidence on a retrial of the cause. Plaintiff is entitled to recover on the second cause of action, and to have determined what actual damages he suffered by the defendant's refusal to transfer his stock, as well as for the value of his services in any sales of the shares, made by him, and paid for by property.

The judgment is reversed with directions for further proceedings in harmony with the views herein expressed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9825.

NEWELL ET AL. v. NEWELL.

1. PLEADING—*Motion to Strike*. Good pleading prohibits the anticipation in a complaint of matter of defense, and such matter should be stricken.
2. APPEAL AND ERROR—*Irrelevant Evidence*. The admission of evidence, in support of irrelevant allegations in a complaint, which is prejudicial to defendants, constitutes reversible error.

3. *Pleading—Immaterial Allegations.* There is no good excuse for confusing an issue and encumbering a record with irrelevant allegations. Trial courts, while they have a large discretion in determining motions to strike, should give to pleadings such consideration as is necessary to insure the presenting of only those facts which are pertinent to the cause of action.

Error to the District Court of Weld County, Hon. Neil F. Graham, Judge.

Mr. JOSEPH C. EWING, Mr. WORTH ALLEN, for plaintiffs in error.

Mr. JAMES W. GAULT, for defendant in error.

Mr. Justice Teller delivered the opinion of the court.

THE defendant in error is the father of plaintiff in error, Samuel Newell, and was plaintiff in an action against the plaintiffs in error on a promissory note, in which action he had judgment. The complaint covers twelve pages in the record. It contains a mass of matter which is wholly irrelevant to the cause of action stated. It recites items of family history, including a story of the making of a will by the plaintiff, an agreement by defendants to support plaintiff during his lifetime and to bury him when dead, none of which has any possible bearing upon the cause of action. A motion to strike seven paragraphs of the complaint, as irrelevant, was denied.

The answer alleged payment of the note by application thereto of debts due from plaintiff to defendants, and by sums due to defendants by reason of their maintenance of plaintiff and his wife for several years, and, further, that plaintiff had voluntarily cancelled the note.

On trial to a jury, the plaintiff was allowed to introduce, over the objections of defendants, evidence tending to prove other indebtedness of the defendants to plaintiff; also evidence of a large number of matters constituting a family quarrel, which involved the plaintiff, his son, the defendant, and another son.

Counsel for defendant in error defends the pleading of these irrelevant matters upon the ground that he expected

that the defendants would introduce evidence, to meet which evidence of these otherwise extraneous matters would be competent. Good pleading prohibits the anticipation in a complaint of matter of defense, and such matter should be stricken out. *Brooks v. Bates*, 7 Colo. 576, 4 Pac. 1069.

From this mass of incompetent evidence, it appears impossible that an ordinary jury could have failed to be prejudiced against the defendants. The jury might have found that the defendants were entitled to credit for the various services rendered to the plaintiff, but have found also that the other loans, as to which testimony was given, offset said services. The admission of the irrelevant evidence was, therefore, error, for which the judgment should be reversed.

Before this cause is again tried, there should be a repleader, and the plaintiff's complaint reduced to a proper statement of the cause of action. There is no excuse for confusing an issue, and encumbering a record by allegations which are wholly irrelevant, but which, in the pleader's mind, may tend to excite sympathy, or arouse prejudice in the minds of the jury. The rules of pleading tend to promote the speedy and due administration of justice, and neither courts nor attorneys are at liberty to disregard them.

While trial courts have a large discretion in determining motions to strike, they should give to the pleadings such consideration as is necessary to insure the presenting of only those facts which are pertinent to the cause of action. A failure to do this increases the burden of the trial court, as well as that of the reviewing court.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9416.

THE GOLDEN CYCLE MINING AND REDUCTION CO. v. THE COLORADO SPRINGS LIGHT, HEAT AND POWER CO.

1. UTILITIES COMMISSION—*Jurisdiction*. The Public Utilities Commission has no jurisdiction to establish rates to be charged by public utilities within the limits of cities named in Article XX of the constitution, known as the Home Rule Amendment.

An order increasing the rate to be paid by a consumer to a light company, for electric current, which is fixed from a consideration of what the rate should be in a territory over which the commission has no jurisdiction, held invalid.

2. PUBLIC UTILITIES—*Rates*. Rates established by a tribunal having authority to establish them, are *prima facie* lawful and reasonable.

Writ of Review to The Public Utilities Commission.

Mr. H. MCGARRY, Mr. WILLIAM V. HODGES, for petitioner.

Mr. RUSH L. HOLLAND, Mr. H. A. SAIDY, for respondent.

En banc.

Mr. Justice Teller delivered the opinion of the court.

IN this cause we are called upon to review an order made by The Public Utilities Commission, on July 31, 1917, in a proceeding to which the petitioner herein was not, at first, a party.

The order required the Reduction Company to pay for the electric current furnished it about \$10,000.00 per annum more than it was paying under a contract between it and the Power Company.

A petition by the Reduction Company for a modification of the order was denied by the Commission. It is assigned as error that the order in question is unreasonable; that the rate charged the Reduction Company is discriminatory, and that the findings of the Commission are not sustained by the evidence. These questions have been argued at length, but in our view of the case they need not be considered. The order was made before our decision in *City of Denver*

v. The Mountain States Telephone & Telegraph Company, 184 Pac. 604, in which it was held that cities named in what is known as the Home Rule amendment to Article XX of the Constitution were exempt from the control of The Public Utilities Commission. One of the cities named in that amendment is Colorado Springs. It has and had the exclusive right to fix the rates to be charged by the Power Company within the city limits. Rates established by a tribunal having authority to establish them, are *prima facie* lawful and reasonable; they are presumed so to be. But a rate fixed without authority enjoys no such presumption. Here we have presented a case in which a rate has been fixed by the Commission, in part at least, from a consideration of what the rate should be in a territory over which the Commission had no jurisdiction. We cannot say that the rate for Colorado Springs, the correctness of which is an element in the fixing of rates to be charged to the Reduction Company, is correct. We have no data on that important question upon which the order was based. There being, under the circumstances here presented, no presumption in favor of the order, and its very basis being shown to be without support, we are unable to do more than to hold that the Commission did not regularly pursue its authority in this matter, as the statute gives this court no authority to make an independent finding of what the rate should be.

For the reasons above stated, the order of the Public Utilities Commission is held invalid and the Commission is directed to vacate the same.

No. 9623.

THE GOLDEN CYCLE MINING & REDUCTION CO. v. THE
COLORADO SPRINGS LIGHT, HEAT & POWER CO.

1. UTILITIES COMMISSION. *Order of the Commission held Invalid* for the reasons stated in *Golden Cycle Co. v. Light Co.*, No. 9416.

Writ of Review to The Public Utilities Commission.

Mr. H. MCGARRY, Mr. WILLIAM V. HODGES, for petitioner.

Mr. RUSH L. HOLLAND, Mr. H. A. SAIDY, for respondent.

En banc.

Mr. Justice Teller delivered the opinion of the court.

THIS case involves an order made by The Public Utilities Commission under date of May 25, 1918, further increasing the rate to be paid by The Reduction Company for electric service furnished to it by the Power Company. The petitioner seeks to have that order set aside. It presents the same legal questions as were determined in No. 9416, a case between the same parties.

For the reasons stated in the opinion in that case, the order in question is held invalid, and the Commission is directed to vacate the same.

No. 9435.

SCOTT v. GILMORE.

1. APPEAL AND ERROR—*Election—Harmless Error.* The jury returned a verdict on each of two counts pleaded, one upon an account stated, the other on quantum meruit; judgment on one count only. *Held*, that the refusal of the court to compel an election, if error, was not prejudicial.
2. *Findings of a Jury on Conflicting Evidence* will not be disturbed by the appellate court.
3. PLEADINGS. *Accord and Satisfaction* must be pleaded if evidence is to be introduced to support the plea.
4. APPEAL AND ERROR—*Correct Judgment.* Where the judgment rendered is manifestly correct, no objection which does not go to the very right of the matter should be permitted to prevent a recovery.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. JOHN T. BOTTOM, for plaintiff in error.

Mr. THOMAS WARD, JR., Mr. JOHN F. MAIL, for defendant in error.

En banc.

Mr. Justice Bailey delivered the opinion of the court.

THIS is an action by defendant in error, Gilmore, to recover for professional services rendered and expenditures made, as an attorney-at-law, for plaintiff in error, Scott. Two separate counts were joined, the first upon an account stated, and the other on *quantum meruit*. Each count was for a like amount, and for the same service and expenditure. Verdict was for plaintiff, recovery being fixed in the sum of \$1,381.45 on each count. Judgment, however, was entered for \$1,381.45 only. It is that judgment which is here for review.

It is unnecessary to discuss all the errors assigned in order to settle the controversy. Defendant urges that plaintiff should have been required to elect as to which of the two counts he would rely upon, and that in effect the jury arrived at two verdicts, the one nullifying the other. The court entered judgment upon one only of the verdicts, so the error, if such there was, manifestly is not prejudicial. No substantial right of the defendant was invaded by the findings of the jury, and there is no ground for reversal on that score. *Boyd v. Munson*, 59 Colo. 166, 147 Pac. 662.

The pleadings present the issues as to whether there was an account stated or an account current, and whether, if there was any liability at all, it had been discharged. The first count in the complaint rests upon an account stated. The answer thereto, after admitting that certain services were rendered and expenditures made, alleges payment in full. The verdict settles the question that there was an account stated, and that it has not been paid. No attack was made upon the account, except a general denial thereof, and a defense of payment. The evidence upon these questions is in sharp conflict, and there is nothing in the

record to take the case out of the usual rule that, under such circumstances, the jury finding will not be disturbed on review.

There is some evidence that two checks, one for \$60.00 and the other for \$25.00, were given and received in accord and satisfaction of the account. This affirmative defense was not pleaded, however, as it should have been had defendant intended to introduce evidence to support it. 1 Enc. Pl. & Pr. 74. Neither is there any allegation of error, fraud or mistake in the account stated, and to impeach it such allegations, or some one or more of them, are essential. *Kronenberger v. Binz*, 56 Mo. 121, cited with approval in *St. Louis, etc., v. Colo. National Bank*, 8 Colo. 70, 5 Pac. 800. In any event, the jury in reaching its conclusion determined, upon conflicting evidence, that there was no accord and satisfaction, and that conclusion will not be set aside, there being ample testimony to support it.

It is vigorously urged, however, that the account was unliquidated, that the debtor conceded liability for a part of it, and tendered checks in full payment, which checks were accepted, thus extinguishing the claim. This raises a question which is not involved, because there is no plea to support it. The issues were made by the parties themselves upon questions of fact, including the question whether there was an account stated, and it is to be noted, that the account stated was rendered after the giving and reception of the checks involved. In brief, the case turns upon fact questions, which were all determined adversely to defendant upon abundant competent evidence, and such conclusions under well settled principles should not be disturbed.

Moreover, we have carefully examined the entire record, including all of the testimony, and it is apparent that services were rendered and expenditures made by plaintiff for the defendant, for which the latter has made no return. Under such circumstances no objections which do not go to the very right of the matter, and which are not substantial in character, should be permitted to prevent recovery and thus defeat a meritorious claim. The judgment seems to

be supported by clear and satisfactory proofs and to be in accord with common fairness and justice, and as the instructions properly and correctly state the law in all material particulars, it should be affirmed.

NO. 9593.

MCPHAIL v. WYAND ET AL.

1. JUDGES—*Not Personally Liable for Damages for Error in Judgment.* Action for damages against a county judge and others for conspiracy to bring about the arrest and conviction of plaintiff for the violation of a city ordinance concerning the licensing of dogs. *Held*, that when it appeared by the complaint that defendant was charged with personal liability for error in judgment while acting as judge, the case was properly dismissed.

Error to the District Court of the City and County of Denver, Hon. John A. Perry, Judge.

Mr. DUNCAN MCPHAIL, *Pro se*.

No appearance for defendants in error.

Mr. Justice Teller delivered the opinion of the court.

PLAINTIFF in error, in the year 1912, was convicted in the county court of violating a city ordinance which required the owners of dogs to secure licenses therefor. The judgment was reversed in this court upon the ground that the city failed to prove that notice was given to the defendant as required by the ordinance, which notice we held to be necessary, before the payment of a license fee could be enforced.

Defendant in error Class was the acting judge of the county court at the time of the trial, and pronounced sentence on the plaintiff in error. After the determination of the case in this court, plaintiff in error brought suit against the several defendants in error for damages, alleging in his complaint that they had conspired to bring about his arrest and conviction.

The trial court sustained a demurrer to the fourth amended complaint, interposed by defendant Class. The next proceeding shown by the record is an order for judgment of dismissal of the action as to Class. What became of the action as to the other defendants does not appear, though they are made defendants in error here.

The theory of plaintiff in error, as disclosed in his brief is that in trying him and imposing sentence, Judge Clark acted without jurisdiction, and was therefore a trespasser. Plaintiff in error treats the reversal of the judgment of conviction as equivalent to a holding that the County Court was without jurisdiction. Plainly such is not the case. The reversal was because of an irregularity, or error occurring in the trial, and not because there was any want of jurisdiction, either of the subject-matter, or of the person of plaintiff. That being so, when it appeared that the complaint that defendant Class was charged with personal liability for error in a judgment entered by him while acting as a judge, the judgment of dismissal was proper.

Finding no error in the record, the judgment is affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

No. 9618.

GREAT WESTERN MANUFACTURING CO. v. ELLEDGE ET AL.

1. APPEAL AND ERROR. A question, concerning a ruling of the trial court to which no exception is saved, will not be considered on appeal, notwithstanding its argument.
2. CONTRACT—*Copartnership*. A contract, executed by one who afterwards becomes a member of a copartnership which adopts it by consent of all parties interested, is the contract of the copartnership.
3. PARTNERSHIP—*Assumption of Indebtedness*. Notes and mortgages executed by individuals in contemplation of the organization of a copartnership and for its use and benefit, which were adopted by the copartnership with the knowledge and consent of all the parties interested, became its notes and mortgage.

4. LIMITATIONS. A debt, otherwise barred by the statutes, may be revived by an implied promise to pay a clear acknowledgment of the debt.
5. *New Promise—For the Court, When.* Where the debt is disputed, its effect to establish a new promise is for the court.
6. *Mortgage—Acceptance of, Containing Reservations—*ties by accepting documents in which a prior grant is expressly excepted, acknowledge the existence of the prior claim so as to preclude their plea of limitations and the statute as to them would be the date they took title.

*Error to the District Court of Conejos County,
C. Wiley, Judge.*

Mr. W. W. HOOPER, Mr. CULVER A. GREEN, 1
in error.

Mr. RALPH L. CARR, for defendants in error.

Department One.

Mr. Justice Burke delivered the opinion of the court.

THE parties, plaintiff and defendants, are the same as in the court below.

The property in question is the S. E. $\frac{1}{4}$ of the Sec. 30, Tp. 34, R. 10, Conejos County, Colorado, containing certain buildings and milling machinery located thereon. In June, 1909, this property was unimproved and vacant. In the State of Colorado. At that time defendant Elledge bought \$4,200.00 worth of milling machinery from plaintiff under a written contract which provided for deferred payments in the sum of \$3,000.00 shown by notes secured by mortgage on the machinery and the real property upon which it was to be located. The notes were executed January 12, 1910, and secured by mortgage on said property, although title to the forty-acre tract was still in the state. This mortgage contained covenants of title in the grantors and it, as well as the notes, were signed by defendants James H. Elledge

A. Elledge, his wife. April 6, 1910, the State Land Board issued a certificate of purchase for said real estate to The Los Cerritos Milling Company under which certificate, if payments therein provided for were made, the Milling Company would be entitled to patent April 6, 1928. It does not appear that the grantee named in this certificate was at that time in existence. May 16, 1910, Elledge and his wife and W. H. Elledge, their son, formed a copartnership under the title of "The Los Cerritos Milling Company." Their articles of copartnership were filed for record November 21, 1911, and provided for the building of a mill on the tract covered by said certificate, which tract should "be purchased from the state for that purpose, if sale can be arranged with the State Board of Land Commissioners", and that James H. Elledge should become the manager of the business.

The last of the notes above referred to fell due July 12, 1911. This note would therefore be barred by the six year statute of limitations July 12, 1917. The present suit was brought December 29, 1917, to foreclose the mortgage for an unpaid balance on these notes. W. H. Elledge disclaimed, James H. and Mary A. Elledge and The Los Cerritos Milling Company defaulted, and defendant Cantu as trustee answered. He alleges an unpaid indebtedness in the total sum of \$4,000.00 due from the Milling Company to the other defendants; his appointment as trustee for them; an assignment to him, in trust, of said certificate of purchase under date of January 2, 1912, and the execution and delivery to him of a second mortgage on the milling property under date of January 6, 1912. In addition to the foregoing said defendant denies the plaintiff's corporate existence and pleads the six year statute of limitations. Plaintiff's replication alleges that the Elledges, the Milling Company and the defendant Cantu, trustee, have, by acknowledgment of his indebtedness removed the same from the bar of the statute. The record further discloses that the Milling Company's assignment of its certificate of purchase, and its second mortgage to Cantu, trustee, were

both expressly subject to the plaintiff's mortgage, and that the assignment was approved by the State Land Board February 20, 1917. At the close of plaintiff's evidence, on motion of defendants, judgment was entered for them denying the foreclosure of plaintiff's mortgage and for costs. To review that judgment plaintiff brings error.

Burke, J., after stating the case as above.

The ground upon which the lower court gave judgment for defendants is not disclosed by the record. If plaintiff's corporate capacity was established, and the mortgage given by Elledge and his wife was originally valid as against the property of the Milling Company, and was not barred by the Statute of Limitations, the judgment must be reversed.

Defendants admit that the question of plaintiff's corporate existence was decided by the trial court adversely to their contention. The record discloses no exception to that ruling. The question is therefore foreclosed here, notwithstanding its argument.

A contract, made by one who afterward becomes a member of a copartnership which adopts it by consent of all the parties interested, becomes the contract of the copartnership. *Lucas v. Coulter et al.*, 104 Ind. 81, 3 N. E. 622.

Plaintiff's notes and mortgage were given by James H. Elledge and his wife in fulfillment of the contract for milling machinery which later became the principal property of the copartnership. Elledge and his wife became members thereof upon its organization. The only other member was their son. Although dated January 12, 1910, the mortgage to plaintiff was not acknowledged until June 18, 1910, about thirty days after the organization of the copartnership. That the contract for the machinery, and the notes and mortgage in payment therefor, were executed in contemplation of its organization, and for its use and benefit, and that these acts of Elledge and his wife were adopted by the copartnership with the knowledge and consent of all the parties interested are beyond question. The notes and mortgage therefore became the notes and mortgage of the Milling Company. A debt otherwise barred

may be revived by an implied promise to pay created by a clear acknowledgement of the debt. *Miller v. Kinsel*, 20 Colo. App. 346, 78 Pac. 1075. Where the evidence is undisputed its effect to establish a new promise is a question for the court. *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

A mortgage which, in the granting clause, expressly excepts a title theretofore conveyed, is a direct acknowledgement on the part of the grantor of the existence and validity of his prior grant. Plaintiff's mortgage was expressly reserved in both documents under which defendants claim. Their acceptance of these with such reservations was such an acknowledgement by them of the existence and validity of the claim of plaintiff as to preclude their plea of the Statute of Limitations thereto. The statute would begin to run as to them on the date they took title. This point is definitely settled in this jurisdiction. *Medina v. Phelps*, 39 Colo. 92, 88 Pac. 848; *DuBois v. First Nat. Bank*, 43 Colo. 400, 96 Pac. 169.

Counsel for defendants has attempted to distinguish between these and the instant case on the question at issue. The argument is ingenious but, in our opinion, unsound. Many cases from other jurisdictions are cited. The general distinction between seemingly conflicting authorities is that in one class the reservation is in the warranty, in the other in the grant. In the first neither grantor nor grantee admits any validity in the title excepted. In the second the grantor is bound by the exception, the grantee by the limitation.

The judgment is reversed, with directions to the court below to enter judgment of foreclosure in favor of plaintiff.

Garrigues, C. J., and Bailey, J., concur.

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ACCORD AND SATISFACTION.

Contract Construed. Plaintiff was the beneficiary in a benefit certificate issued by a fraternal society to her husband, in the sum of \$2,000.00; but with provision that if insured should die by his own hand only one-half the sum stated would be payable. The husband committed suicide and the society sent to the widow a check for \$1,000.00, on the back of which was a writing to the effect that it was in full settlement of all claims and certificate issued to the husband. The widow accepted and collected the check without any misrepresentation inducing the action. *Held* an accord and satisfaction. *Webb v. Head Camp, Woodmen*, 60 Colo. 529, distinguished on the ground that by the Act of 1907, Sec. 78, and sec. 4 of c. 139 of the laws of 1911 and sec. 37 of c. 99 of the laws of 1913, the statutory provisions upon which the decision in that case is based were no longer in effect. *North American Union v. Montenie*, 220.

ACCOUNTING.

Performance by Plaintiff. Where mutual dealings have been had by the parties, under a contract not yet fully performed, plaintiff is entitled to an accounting as to the part performed, and no allegation of full performance is necessary. *Olson v. Harvey*, 180.

Jury. Defendant in a bill for an account is not entitled to trial by jury, even though he denies one of two contracts upon which the account is demanded. *Id.*

A jury having been called to try one phase of the controversy, *held* that the court was entitled to modify the verdict. *Id.*

ACTIONS.

Prior Action Pending—To Which Plaintiff is Not a Party, is no plea. *Reitler v. Olson*, 65.

Statutory Proceeding—Sufficiency of Statute. It is sufficient for any proceeding that it is authorized under any statute relevant thereto. *Sternberger v. Continental Co.*, 129.

Alienation. Action by husband against an alleged seducer for the alienation of the wife's affections. The wife testified that prior to meeting the defendant she had, because of the ill conduct of plaintiff, entirely lost her regard for him. Letters of plaintiff to the wife admitting his misconduct, and praying forgiveness, were offered on behalf of defendant, and objected to as inadmissible under the statute. Considering that the state of mind of the wife towards the husband was directly in issue, that affection on her part was a pre-requisite to injury by its loss, and that to permit the husband to recover damages upon the mere presumption that wives entertain affection for the husband, denying material evidence to the contrary would be subversive of justice. *Held* that the letters were admissible, and that to exclude them was error. *Keeler v. Russum*, 196.

Tort—Waiver of. Except as to those which are purely personal a tort may be waived, and an action brought in assumpsit. *Zinn v. Denver Livestock Co.*, 274.

Plaintiff having ridden into an excavation made by another than defendant has no action against defendant. The contention that a fence erected by defendant around a building in course of construction had produced or contributed to plaintiff's injury was rejected upon the ground that the fence was lawfully constructed and was maintained only for a reasonable time. *McPhail v. Seerie Bros. Co.*, 400.

Defenses—Want of Consideration is not established where an assignment of the right to employ an alleged invention, accepted by the directors of a corporation, without fraudulent practice by the assignor to induce the acceptance, is shown by undisputed evidence. *Kunkle v. Soule*, 524.

ADMINISTRATORS.

See PROBATE LAW.

AGENCY.

Broker—Duration of Agency. The law presumes that the agency of a broker employed to sell lands will continue only for a reasonable time, to be determined by a consideration of the nature of the contract, the circumstances attending its execution, and all the circumstances of the case. *Cocquyt v. Shower*, 89.

At the time of the employment of the broker certain prospective investors were expected, and the time of their arrival, and the time to be given them for consideration was discussed.

The subject matter of the agency was not only a valuable ranch, but young livestock, increasing in value, and the broker not having produced a purchaser until the lapse of a year from his employment, and the land owner having in the meantime broken up and planted fifty acres of new land, *held* that the agency had expired. *Id.*

Agent's Authority. B. was employed by plaintiff to settle or compromise a claim which he asserted against another. There being no limitation upon his authority it was assumed to authorize a stipulation for the application upon the promissory notes received in the settlement, as a payment, the notes of another, before that received by the plaintiff from defendant. Retaining the notes of the third party, after agreeing to their application as payment, amounts to an acceptance, and the parol modification of the notes upon which they are to be applied. *Bartholomew v. Emerson-Brantingham Co.*, 244.

Agent's Authority. The landlord "gave the tenant to understand" that he was represented by his son Eusebio, or that the son "did business for him." *Held* too vague to determine the authority of the son. *Montez v. George*, 247.

The direction of the landlord to the tenant "when I am not here pay Eusebio," confers no authority upon the latter to eject the tenant. *Id.*

General Agent, may not go outside of the usual course of the business in his charge. *Id.*

Insurance—The agent accepted the promissory note of the insured, payable to himself, for the premium; inasmuch as this was permitted by the instructions of the company it did not invalidate the undertaking. *Mayhew v. Glazier*, 350.

Liability of Agent, for his failure to transmit an application for hail insurance and the subsequent partial destruction of the crop, was the same as what would have been the liability of the company in that case, if the application had been forwarded and accepted. *Id.*

APPEAL AND ERROR.

Record. The record presented upon application for a superseas failing to show an objection taken to any instruction given, or that any instructions were tendered on the part of the accused, or any exception taken to the giving or refusal of any instruction, the instructions given being fair, rulings as to the admission or exclusion of evidence devoid of prejudice, and no errors being assigned, the judgment was affirmed. *Amaya v. People*, 8.

Exception, when necessary. An exception to the appointment of an assistant to the District Attorney, should be taken when such appointment is announced. To defer it until the record is made up, waives the objection. *Cohen v. People*, 10.

Judgment. A judgment awarding execution against the body, such award not being warranted by the record, the court below was directed to amend in this respect, and thus amended the judgment was affirmed. *Baker v. Allen*, 59.

Presumptions. A finding of fact not questioned in the assignments of error, nor in the brief, may be presumed to be supported by the evidence. *Twombly v. Sauve*, 62.

Failure to Decide Only Question of Fact, properly presented, is error. *Reitler v. Olson*, 65.

Finding on Conflicting Evidence, is not to be disregarded. *Cocquyt v. Shower*, 89.

Practice in Error—Discretion. The court will not interfere with discretionary action, except in a clear case of abuse. *Hille v. Evans*, 98.

Record. The questions as to which there is no evidence in the record will not be considered. *Sternberger v. Continental Co.*, 129.

Distinguished. An appeal from a judgment is a continuation of the action in which the judgment was given. A writ of error is a new and different action. *American Surety Co. v. Cresson Co.*, 168.

Judgment. The judgment being reversed for the referee's refusal to hear evidence as to one feature of the case, upon which he was entitled to be heard, the cause was remanded with directions that it should be referred to the same referee to hear evidence upon this question alone. *Olson v. Harvey*, 180.

Practice in Error—Non-Suit. Evidence sufficient to go to the jury having been submitted by plaintiff a judgment of non-suit was held error and reversed. *McDaniels v. Sell Baking Co.*, 202.

Practice in Error—Finding Upon Sufficient Evidence, will not be disturbed. *Weir v. Colorado Investment Co.*, 237.

Matter Not Pleaded, but treated by both parties as in issue will be considered in the court of review. *Bartholomew v. Emerson-Brantingham Co.*, 244.

Findings on Conflicting Evidence, will not be disturbed. *McCallister v. Schulte*, 289.

Province of the Court of Review, is to examine the entire evidence, and determine whether the trial court or jury misunderstood its force and effect. *Boyd v. Boyd*, 293.

Presumptions. Where a reply is held sham, upon evidence not presented in the record, the court of review must presume such evidence sufficient. *Bollen v. Woodhams*, 322.

Submitting to the jury a question upon which there is no evidence, is error. *Abdun-Nur v. Valdez*, 334.

Judgment. Defendant had entered into a fraudulent scheme with the administrator of an intestate estate, the effect of which was to exclude the claim of the plaintiff against said estate. Valuable premises pertaining to the estate had been sold to satisfy a mortgage, and defendant purchased the certificate of purchase. Judgment for defendant was reversed with directions to the court below to enter judgment for the plaintiff, declaring his judgment to be a lien on the premises in question as of the date of the sheriff's deed, but subject to the amount of the certificate of purchase, without interest. *Scholtz v. Hazard*, 343.

Law of the Case. Where upon a second trial, after the reversal of the judgment first given, the facts shown are substantially the same as those presented at the first trial, the opinion of the court of review is the law of the case. It is not to be contended that the evidence is insufficient. *Thomas v. Selkregg*, 360.

Objections not taken below. A document was offered for the intervenor, and admitted with a qualification. It was afterwards admitted without qualification. Plaintiff failing to ask an instruction upon the question, at the close of the evidence, waived the error so committed. *Beaver Park Co. v. Cowie*, 390.

Defects in Bill of Exceptions, Abstract and Assignment of Error, precluding an intelligent examination of the contentions of plaintiff in error, the judgment was affirmed. *Zall Jewelry Co. v. Stoddard*, 395.

Findings supported by competent testimony, will not be disturbed. *Feit v. Reichert*, 410.

Judgment supported by competent evidence, will not be disturbed. The rule applies where only a part of the witnesses are examined before a referee. *Ouray County v. San Juan County*, 428.

Judgment for Relief Not Demanded. Treated as a nullity. *Durham v. Wilson*, 430.

Judgment. The party successful below appearing by the record not entitled to any relief, the judgment was reversed and the lower court directed to dismiss the action. *Bower v. Pound*, 457.

Conflicting Evidence. Verdict upon will not be disturbed. *Smillie v. Mendoza*, 461.

Harmless Error. Complaint containing two causes of action alleged to be inconsistent. Demurrer for misjoinder, and motion to compel an election denied; but the court limited plaintiff's recovery to what was demanded in one of the counts. *Held* to render the error harmless. *Keith v. Schuck*, 480.

A decree appropriate to a suit in equity after judgment at law was held no reason to remand the cause. *Id.*

Defense Not Pleaded, is not noticed in the court of review. *Benish v. Jones*, 484.

Harmless Error. The exclusion of evidence which is made immaterial by what appears in the record is harmless. *Greenlees v. Chezick*, 521.

Judgment. Action by stockholders of a corporation to rescind the purchase by the directors of an invention of little value. The defendant pleaded the delivery to the company of certain chemical apparatus as an additional consideration. The court below having found that the invention was of no assignable or market value, rescinded the contract, and ordered the chemical apparatus restored. The Supreme Court having found that the invention was not without value, reversed the judgment for plaintiff, and, as well, the order for the return of the chemical apparatus. *Kunkle v. Soule*, 524.

Oral Evidence, heard in the court below is, upon error, viewed in the light most favorable to the party prevailing below. *Gerard v. Costen*, 542.

Judgment. A judgment will not be disturbed by the appellate court, if there is evidence to justify it. *Jones v. Boyer*, 568.

Bill of Exceptions. Informal remarks of the court made in passing judgment, are not made findings by so denominating them in a bill of exceptions. *Id.*

Refusal to Discharge Receiver Final Order, When. Ordinarily the overruling of a motion to discharge a receiver is interlocutory and not appealable, but the rule depends on circumstances. Where the petitioner was a judgment creditor, clearly entitled to the relief asked, and the denial of his petition in effect precluded him from collecting his judgment, the order of denial was held, as to him, final and appealable. *Peterson v. Daniels*, 576.

Irrelevant Evidence. The admission of evidence, in support of irrelevant allegations in a complaint, which is prejudicial to defendants, constitutes reversible error. *Newell v. Newell*, 585.

Election—Harmless Error. The jury returned a verdict on each of two counts pleaded, one upon an account stated, the other on quantum meruit; judgment on one count only. *Held*, that the refusal of the court to compel an election, if error, was not prejudicial. *Scott v. Gilmore*, 590.

Findings of a Jury on Conflicting Evidence will not be disturbed by the appellate court. *Id.*

Correct Judgment. Where the judgment rendered is manifestly correct, no objection which does not go to the very right of the matter should be permitted to prevent a recovery. *Id.*

Exceptions. A question, concerning a ruling of the trial court to which no exception is saved, will not be considered on appeal, notwithstanding its argument. *Great Western Co. v. Elledge*, 594.

ASSIGNMENTS.

What May Be Assigned. A right of action for the conversion of personalty; or a claim for damages to property. *Zinn v. Denver Livestock Co.*, 274.

Second Assignment, of what has already been assigned passes nothing. *Smith v. Campbell*, 519.

AUTOMOBILES.

Rules of the Road—Cities. The rules of the Road in Cities require every vehicle to travel on the right hand side. *Golden Eagle Co. v. Mockbee*, 312.

Duty of driver at street intersection. It is the duty of every driver of an auto car, when approaching a street intersection, to use reasonable care to see whether there is likelihood of a collision with a car approaching from the right, and if there is, to yield to it the right of way, and to keep his car under such control that he can do so. *Id.*

The one having the right of way is not absolved from reasonable care, and the driver not having the right of way is entitled to assume that the car approaching from the right is not driving at a negligent rate. *Id.*

BANKRUPTCY.

Construction of Statute. The provisions of the Bankruptcy Act concerning the discharge of the bankrupt from his liabilities are to be strictly construed. The bankrupt who fails to use due diligence to ascertain the residence of a creditor, and so fails to give his residence in his schedule is not discharged of the debt. *Popejoy v. Diedrich*, 383.

BILLS AND NOTES.

Contribution—Accommodation endorsers. Where one of several accommodation endorsers, pays the bill or note endorsed he is entitled to contribution. *Owens v. Greenlee*, 114.

Collateral Security, held by the party making the payment in no manner defeats his action for contribution. *Id.*

Endorsers—Notice of Dishonor. In a suit in equity by one of several accommodation endorsers against the others, for contribution, the defendants will not be heard to contend that they were entitled to notice of the dishonor and protest of the bills. *Id.*

The provisions of Rev. Stat., sec. 4552, have no application in such case. *Id.*

Assignment Without Recourse—Effect. A mortgage was assigned "with the notes therein described, without recourse in any event." Held that though the defendant had previously endorsed the notes, the endorsement and assignment being parts of one transaction, though of different dates, were to be construed together. *Gillett v. Flora*, 218.

BONDS AND UNDERTAKINGS.

Justice of the Peace—Appeal Bond. An appeal approved was neither filed by nor left with the clerk from him to the clerk of the county court approve it. The appeal was dismissed. *William* 4.

Surety in Injunction Bond—Rights. Defendant injunction to restrain the sale of its properties for a bond became surety in the injunction bond and defendant into an agreement to pay \$125.00 on a specified day until it should "serve competent and written evidence of plaintiff's discharge." Plaintiff was entitled to the premium pending a writ of error. *American Surety Co.*, 168.

Bond of Executrix—Liability of Surety. A bond which was surety on the bond of an executrix, had defendant, another surety company, agreed with plaintiff all of its obligations under the bonds hereby assume all valid claims arising under said bonds in accordance with the terms and conditions thereof. *Held*, an action upon the administrator of the estate, appointed after the executrix, might be maintained against defendant's surety. *People ex v. American Surety Co.*, 231.

Sureties—Contribution. Judgment was recovered on a livery bond against one of the sureties therein. If the judgment he was entitled to contribution from the other sureties though they were not served with process nor made parties in action on the bond. *Dunkle v. Haight*, 404.

Redelivery Bond—Assignment by sheriff, is not an order to bring action thereon by one otherwise entitled to action. *Id.*

And the judgment thereon is conclusive evidence of liability, if necessary. *Id.*

BREACH OF PROMISE.

Promise to Marry—Breach—Evidence. Action on a promise to marry; promise denied. The acts of the parties which an inference as to their relations may be drawn from is admissible. Letters between the parties bearing upon the promise are admissible. *Smillie v. Mendoza*, 461.

False Defamation of Plaintiff, the charges not proved, may aggravate the damages. *Id.*

Damages—Excessive. The courts are very uniform in setting aside a verdict in this class of cases as excessive.

Evidence—Objections to, by counsel of the party denying in his own behalf, and upon his own motion, is a question for review. *Id.*

Wealth of Defendant, is relevant and may be shown by competent evidence. *Id.*

Plaintiff's Character, may be shown, where defendant denied it. *Id.*

BROKERS.

See AGENCY.

Real Estate Broker—Right to Compensation. The broker who produces the purchaser, and is the procuring cause of the sale is entitled to the commission, even though the sale is in fact accomplished by another. Defendant listed his land for sale with plaintiff, and with another, at a price lower than that named to plaintiff, one Richardson. Richardson sold the land to a purchaser whom plaintiff had brought to the country and to whom he had exhibited the land, and who would have purchased from him, but for the lower price named to Richardson. Plaintiff was entitled to his commission. *Millage v. Irwin*, 188.

Real Estate Broker—When Entitled to Commission. Where under employment of the owner he effects a sale, or is the moving cause of one effected by the owner. *Morgan v. Howard Realty Co.*, 414.

So where a sale is frustrated by the employer. *Id.*

Contract Construed. "A proper abstract of title" must be held to be an abstract showing a merchantable title. Where the employment is exclusive in terms, the owner cannot negotiate a sale on other terms than those prescribed to the broker and defeat the broker's commission. *Id.*

Real Estate Brokers—Commission. A broker employed to procure a purchaser for real estate earns his commission when, through his efforts, a purchaser meets the employer and a sale is made to him. *Jones v. Boyer*, 568.

CHATTEL MORTGAGE.

Description. A mortgage with an insufficient description is aided by an agreement of the parties as to what is included. *Zinn v. Denver Livestock Co.*, 274.

Parol Evidence as to Description. The mortgagee may show that the chattels which he claims are those intended to be included in the mortgage, though they are not properly described. *Id.*

Notice of Mortgage. One dealing for personal goods with notice of a mortgage thereon is bound by the mortgage, regardless of any defects in the description. *Id.*

Assumption of Possession by Mortgagee, cures all minor defects, e. g., insufficiency of description. *Id.*

CIVIL SERVICE.

The amendment to the Constitution adopted in 1919 (Laws 1919, p. 343) provides that those holding places in the classified service when the amendment takes effect "shall retain their positions until removed, under the laws enacted in pursuance hereof." Respondent was unlawfully holding a civil position when the amendment became of force. Held he was not retained therein by the amendment. *People ex rel. v. Chew*, 158.

CONSTITUTIONAL LAW.

Statute—Unconstitutionality Of, must appear beyond a reasonable doubt. *Post P. & P. Co. v. Denver*, 50.

Obligation of Contracts. It is the overwhelming weight of judicial opinion that constitutional provisions against laws impairing the obligation of contracts do not prevent the state from

the proper exercise of the power vested in it for the promotion of the common weal and the general good. *Ohio & Colo. S. & R. Co. v. Utilities Com.*, 137.

Private contracts must yield to the public welfare where the latter is appropriately declared and defined. *Id.*

Construction of the Constitution. In construing any provision of the Constitution the presumption is in favor of the meaning in which the words in question are usually understood. *Prior v. Noland*, 263.

Legislative Power. It is clearly within the power of the state to prohibit the manufacture and sale of intoxicating liquors, and to adopt any reasonable regulations necessary to make the prohibition effective. *Galloovich v. People*, 299.

The provisions of the enactment are sufficiently expressed in the title. *Id.*

Expressio Unius Exclusio Alterius, is not a fixed and unalterable rule, nor is it in high favor, nor of universal application, as a rule of constitutional construction. *Id.*

CONTRACT.

Special Contract—Quantum Meruit. One who alleges a special contract and gives evidence thereof is not entitled to recover on a *quantum meruit*. *Reitler v. Olson*, 65.

Consideration. An agreement upon past consideration is *nudum pactum*. *Plains Iron Works Co. v. Haggott*, 121.

Validity. Frank and John Lannon owned the stock of the defendant. Burris desiring to become interested in the enterprise, it was agreed that the property of the company should be valued at \$100,000. Burris was unwilling or unable to pay for one-half of the stock, at this valuation, and it was agreed to issue \$40,000 in bonds, so as to reduce the value of the shares to \$60,000, and the arrangement was concluded accordingly, the bonds being issued one-half to the Lannons and one-half to Burris. Only \$8,000 in all, was paid for the bonds, \$4,000 by the Lannons and \$4,000 by Burris. All this was agreed to and approved by meetings of the stockholders and Board of Directors,—the two bodies being composed of the same persons. The bonds were secured by mortgage of the company's property. On bill to foreclose this mortgage it was contended by the corporation that the bonds were void for want of consideration under sec. 9, article XV of the Constitution. *Held* that in effect the bonds were sold at approximately par value; that the distribution of the bonds among the directors was justified by the unanimous consent of the stockholders, and that the stockholders having acquiesced and participated in the transaction, were bound by it, as were those who succeeded to their interest. *Pueblo Foundry & M. Co. v. Lannon*, 131.

Construed. An oral contract between a building contractor and his foreman was held by the court below to entitle the plaintiff to one-half the net profits arising from a certain building, unless they should be less than, &c., in which case one-third. *Held* clear, definite and sufficient. *Olson v. Harvey*, 180.

Waiver of Contract Right. Contract providing that plaintiff should be entitled to one-half the profits of one of two contracts,

but only on condition that his services were "faithfully and diligently performed to the satisfaction of the architect." Defendant having made payments to plaintiff on account of the profits during and after the alleged misconduct, and presented an account after the completion of the building, making an allowance to plaintiff on account of profits, *held* a waiver of the condition. Defendant presented an account of certain dealings between the parties offering payment of the balance as stated therein, without suggesting that the time of settlement had not arrived. *Held* a waiver of this objection, and a dispute having arisen, plaintiff's bill for an account was sustained and defendant's contention that his action was premature rejected. *Id.*

Defenses. Defendant agreed to pay plaintiff a share of the profits upon certain work when all the indebtedness incurred by defendant in the execution of the contract should have been discharged. On account of his profits being demanded, *held* he could not make his own delinquency in paying the liabilities incurred by him in the work the basis of a claim that the action was premature. But *held* that he was not to recover one-half the profits in full, if his misconduct caused damage to defendant. He who seeks equity must do equity. *Id.*

Construed. Adamson agreed to deliver and defendant to buy "all hay grading No. 2 or better grown or growing" upon certain described lands. Adamson was the owner of the hay and it was in stacks upon the lands mentioned. *Held* that no title passed until the hay was graded and accepted by defendant. A subsequent mortgagee of Adamson has the better right. The mortgagee having assumed possession contracted to sell it and defendant to buy it, at a specified price per ton. Defendant was liable for the price so agreed upon notwithstanding his prior contract with Adamson. *Gordon v. Denver Alfalfa M. & P. Co.*, 199.

Construed. Plaintiff holding contracts from certain parties residing in another state for the delivery by such non-residents of a specified number of lambs, assigned it to defendant, in consideration of defendant's written agreement to pay "a cent a pound on lambs that are delivered to me" by the parties contracting to make the delivery. In fact no lambs were ever delivered, nor were the parties to the original contract with plaintiff, able to make delivery. *Held* that no lambs having ever been delivered to the defendant, plaintiff was not entitled to an action against him. *Houston v. Snyder*, 214.

Construction. Writings of different date but parts of one transaction are to be taken together. *Gillett v. Flora*, 218.

Waiver of Contract Provision. A contract for purchase and sale of live stock, one party to advance the money and the other to conduct the business, provides that the parties should "advise and counsel with each other and furnish all information regarding transactions agreed upon." Plaintiff, the one conducting the purchases and sales, made several purchases without consulting with his partner. As to some of these defendant accepted and settled therefor, without complaint. There was no suggestion of fraud in any of the transactions. *Held* that defendant was not permitted to waive the provisions of the contract in one instance and insist upon them in others. *Bond-McConnell Co. v. Snyder*, 238.

Public Policy. Contract of the agent of an insurance company to forward to the home office an application for insurance is not in conflict with any duty of the agent to his principal, and is not against public policy. *Mayhew v. Glazier*, 350.

Duty of Plaintiff to Protect Himself Against Defendant's Default. Plaintiff not being informed of defendant's failure to transmit the application, until after the destruction of his crop, was not prejudiced by his omission to seek other insurance. *Id.*

Construed. An attorney was employed by the drainage District "until its final completion." *Held*, to import the organization and establishment of the district, as a legal entity, and not the completion of the drainage works contemplated. *San Luis District v. Stanley*, 393.

Construed. Contract for the planting and cultivation of beans by plaintiff, and the subsequent delivery of the product to defendant. Below the signature to the writing evidencing this agreement was a memorandum in writing in these words, "Guarantee prices as much as any other house." Plaintiff having delivered the beans raised by him and been paid therefor the price specified in the contract, sued for an additional per cent on the ground that another house had paid for beans a price in excess of that paid for plaintiff, and that the clause quoted entitled him to such excess. *Held* that the memorandum relied upon by plaintiff was expressly excluded from the contract by the final provision thereof that "there are no agreements or understandings other than those expressed above." *Balcom v. Michael*, 407.

Reformation or Rescission—Election. Where facts justify either reformation or rescission party must elect and abide such election. *Feit v. Reichert*, 410.

Oral Negotiations, preceding or accompanying the execution of an agreement in writing merge therein. *Morgan v. Howard Realty Co.*, 414.

Undue Influence—Promise to Marry. Bill to vacate a conveyance of lands upon the ground of undue influence, plaintiff alleging that the defendant promised to marry him, and by reason of this promise the defendant had acquired influence over him, and had induced him to execute the conveyance without consideration.

The evidence examined, and held to justify a finding for defendant below. *Gerard v. Costen*, 542.

Construction. An unreasonable purpose should not be imputed to the parties.

A contract provided for the payment of \$14,000 in monthly installments in satisfaction of "both principal and interest upon the unpaid part of the purchase price, to be continued" "until the same equals \$14,000 with interest upon said sum from the date hereof, until payment thereof." *Held* that the first clause was controlling, and that the purchaser having complied with it was not required to pay in addition interest upon the principal of \$14,000. *San Luis Valley Assn. v. Holbert*, 544.

Construed. "Proceeds", in a contract providing "on the basis of 60 per cent net to the treasury of your company of all stock sales," construed to mean money paid for stock. *Kingsbury v. Riverton-Wyoming Co.*, 581.

Recovery under. But a broker under such a contract, where he is to receive 40 per cent of the "proceeds", is not prevented from recovering for the value of his services, if any, for the sale of stock issued in payment for property or services. *Id.*

Copartnership. A contract, executed by one who afterwards becomes a member of a copartnership which adopts it by consent of all parties interested, is the contract of the copartnership. *Great Western Co. v. Elledge*, 594.

CORPORATIONS.

Transactions With Directors. The lending of money to a solvent corporation by the directors thereof is not illegal. *Hille v. Evans*, 98.

Embryo Corporation—Liability on Contracts of Those Promoting Its Organization. An agreement among those proposing the organization of a corporation, as to commissions to be paid to parties who assist in the project is not binding upon such corporation, when organized, unless it expressly or impliedly assumes the liability. *Plains Iron Works Co. v. Haggott*, 121.

The mere acceptance of property by the corporation paying therefor in full by the issue of its stock does not under the facts in this case warrant an inference of such assumption. *Id.*

Relation to Members. Where the stockholders have no equitable right they cannot assert any such supposed right, or obtain relief in respect thereto by acting through the corporate entity. *Pueblo Foundry & M. Co. v. Lannon*, 131.

Power to Dispose of Assets. A solvent corporation may dispose of its assets as the stockholders see fit, so long as present creditors are not injured. *Id.*

Public Service Corporations—Just Compensation for Service. A Utility Corporation is entitled to a fair return upon the reasonable value of its property at the time it is being used for the public. *Ohio & Colo. S. & R. Co. v. Utilities Com.*, 137.

Extensions and Improvements, are not to be made, without the approval of the Utilities Commission. If such improvements are found unprofitable the company must be loser. It will not be permitted to charge the loss to the public. *Id.*

Smelting Company—Affected With a Public Interest. A smelting company treating ores from various parts of the state, is affected with a public interest. *Id.*

Levy on Stock. It is not contemplated by the statute that an officer shall determine the ownership of corporate shares, otherwise than by the books of the corporation. *Snider v. Bourquin*, 207.

As to creditors no one is an owner of shares unless shown by the books to be such owner. *Id.*

A sale under execution against one person, of shares standing on the books of the corporation in the name of another, is without effect. *Id.*

Stock not transferred on the books may be reached by proper proceedings. *Id.*

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Rights of Pledgee. Plaintiff received in pledge ment Company, corporate stock standing on the book in the name of a third person. Defendant's claims against the apartment company levied upon caused them to be sold by sheriff, and became Plaintiff, though he had never complied with the registration of the pledge (Rev. Stat., sec. 870) maintain an action to vacate the sale to the defendant.

Corporate Stock—Situs of, is the state where was created. *Clark v. O'Donnell*, 279.

Failure to file annual report—Complaint of omissions show whether no report was filed, or whether the report with sufficient detail set out the particulars required is insufficient in law. *Schroeder v. Snarr*, 418.

False Report—In due form, is sufficient to protect from liability under c. 102 of the Acts of 1911. *Id.*

The directors responsible for a false report are liable. Rev. Stat. sec. 876. *Id.*

Stockholders, cannot repudiate a transaction with the corporation. *Kunkle v. Soule*, 524.

Foreign, may not maintain an action in the court without complying with Sec. 904, Rev. Stat. 1907 against an officer of the corporation who unlawfully records is within the statute. *King Copper Co. v. ...*

Annual Report. A report containing no statement of indebtedness as owed by the corporation was filed or held not a compliance with the statute. *Pertini Oil Co.*, 564.

The report should be filed within reasonable preparation, the time depending upon the circumstances. *Id.*

Former Default, by a corporation in filing an annual report is no bar to the creditor's action against a director upon a later default. *Id.*

Transfer of Stock. Officers of corporations in the sale of shares of stock and issuing certificates, act in a fiduciary capacity. *Kingsbury v. Riverton-Wyoming Co.*, 581.

Indebtedness to. Officers cannot appropriate the shares of stockholders of record, who chances to be indebted to the corporation; they can reach his interest only by statutory authority and a refusal to transfer the shares at the request of the holder has been held a conversion. *Id.*

COSTS.

In Criminal Cases. Sec. 3877 R. S., has no application in the county court on appeal from a conviction by the county court of the peace; the prosecuting witness cannot be awarded the costs. *Knight v. People*, 87.

In Criminal Prosecutions—Exemptions. Sec. 3878 Revised Statutes relates solely to costs accrued in civil actions. *Sherman v. Alexander*, 110.

COURT RECORDS.

Amendment. The Court has power to amend its record so as to make it speak the truth. *Mulligan v. People*, 17.

CRIMINAL LAW.

Assistant to District Attorney. The District Court has inherent power to appoint an assistant to the District Attorney. *Cohen v. People*, 10.

To constitute error in such appointment an abuse of discretion must affirmatively appear. *Id.*

Grand Jury—Oath—Presumptions. All presumptions are indulged in favor of the regularity of the impaneling of the Grand Jury. *Mulligan v. People*, 17.

Principal and Accessory. An accessory may be charged and convicted as principal. *Id.*

The statutory provision authorizing the punishment of an accessory as principal is not opposed to sec. 25 of article II of the Constitution. *Id.*

Evidence. Whatever is competent to determine the guilt of the principal is competent, for this purpose against the accessory. *Id.*

A confession of the principal, though not made in the presence of the accessory is evidence against the accessory, but only to establish the guilt of the principal. *Id.*

The state must show, either directly, or by conclusive circumstances that the accessory had knowledge of the principal's offense. This may be established as an inference from the facts and circumstances in evidence. *Id.*

Objections to Testimony. Where there is no effort to confine such testimony to the guilt of the principal a mere objection that the testimony is hearsay, and no part of the *res gestae*, will not be regarded on error by the accessory, *Id.*

Evidence. Indictment for Criminal Conspiracy. Conversations had while the conspiracy is in progress are admissible. *Dalton v. People*, 44.

Husband and Wife may conspire to commit a criminal offense. *Id.*

Privileged Communications. A letter written by a woman convict to her husband, touching an alleged conspiracy, is not, without the wife's consent, admissible against another accused of participation in the same offense. *Id.*

Objecting to a copy of the letter is not a waiver of the wife's privilege. *Id.*

Hearsay. Statement of the husband to the District Attorney upon exhibiting the letter, as to a part thereof not exhibited, is hearsay and not admissible. *Id.*

Unauthorized Disclosure, by the husband does not waive the wife's privilege. *Id.*

Conspiracy—Evidence. Defendant was charged with a conspiracy to steal an automobile. He had taken the car in Sterling and driven it to Julesburg. An instruction requiring that in order to convict the jury must believe that this removal of the car was in pursuance of the conspiracy held properly refused. *Id.*

Robbery. One who, attempting to reclaim money stolen from him, assaults the supposed thief, taking the money stolen is not guilty of robbery. *Analytis v. People*, 74.

Fair Trial. Defendant while without counsel, was arraigned under an information charging (1) Larceny of an auto car, and (2) Receiving the car knowing it to have been stolen, and requested further time to plead. This was denied. Shortly before this and while represented by counsel he had pleaded not guilty to an information containing the same charge upon which he was arraigned. Held not prejudicial. *Bush v. People*, 75.

Excessive Bail. One without means to employ counsel is not to be excused from giving bail, when charged with a crime, even though he is already under his personal recognizance, in a former information, charging the same offense. *Id.*

Continuance. A continuance on the day appointed for trial, granted against the prisoner's objection, was assigned for error, because on the day first appointed he had a witness present, whose attendance he was not able to procure at the later day. No effort of prisoner to secure the attendance of his witness being shown, his contention as to the illegality of the continuance was held without merit. *Id.*

Endorsement of Additional Witnesses Upon Information, after its filing, will not be regarded as error where no objection is taken either before trial or when the witnesses are sworn, and no surprise or prejudice to the accused is shown. *Id.*

Promise of Indemnity to Witness, goes only to his credibility. *Id.*

Instructions. Information for larceny, and for receiving the same goods, knowing the larceny. Verdict of guilty upon both counts. The judge instructed the jury that the accused could not be convicted of both these offenses, and directed them to revise their verdict. Held these remarks were not instructions within the meaning of Rev. Stat., secs. 1987-1988. *Id.*

Discourse by Judge, in imposing sentence. His Honor in announcing the sentence of the convict alluded to the prevalence of the crime with which he was charged, and his former conviction. Held not error. *Id.*

Accomplice—Corroboration Of, may be by circumstances. *Id.*

Record. Complaints of prejudicial circumstances not evidenced by anything in the record will not be considered. *Id.*

Other Crimes of similar character participated in by the accused is competent, and comment of counsel thereon is proper. *Id.*

Costs. Sec. 3877 of the Revised Statutes has no application to a trial in the County Court on appeal from a conviction before a justice of the peace. The prosecuting witness cannot be adjudged to pay the costs of the prosecution. *Knight v. People*, 87.

Former Jeopardy, must be specially pleaded. The question cannot be raised by a motion for an instructed verdict. *Bosko v. People*, 256.

Information—Irregularity—Waiver. Where the District Attorney presents an information as a substitute for one already pending, and the accused, without objection, pleads thereto, he waives all irregularity in the proceeding and the question of prior jeopardy. *Id.*

Affidavit. Where two offenses are charged in the information, supporting affidavit reciting "that the facts set forth in the foregoing information are true and that the offense therein charged was committed" held to cover both. *Ausmus v. People*, 47 Colo. 165, followed. *Id.*

DAMAGES.

Violation of contract. One who being entitled to employment for a time certain, under a contract, is denied such employment, may recover any diminution in what his income would have been if allowed to serve under the contract, even though he received other compensated employment for the period of his contract. *Ryan v. School District*, 370.

In any event he is entitled to nominal damages. *Id.*

Measure of, in an action for the destruction of a growing crop, is the value of the crop at the time and place of the injury. *Hoover v. Shott*, 385.

The evidence examined and held insufficient to establish the damages occasioned by the tort complained of. *Id.*

Corporation—Refusal to transfer stock. A stockholder in a corporation is entitled to at least nominal damages for the refusal of the officers to transfer his stock as requested. *Kingsbury v. Riverton-Wyoming Co.*, 581.

DEBTOR AND CREDITOR.

Motives of Creditor. Where neither the right of recovery nor the propriety of the procedure is disputed, the courts will not concern themselves with the creditors' motives. *Hille v. Evans*, 98.

Indebtedness. A creditor can not lawfully pay himself with a debtor's money without the debtor's consent and when a debtor delivers him money for a purpose which negatives the idea of payment, the creditor's control is limited to the purpose declared. *Kingsbury v. Riverton-Wyoming Co.*, 581.

DESCENT AND DISTRIBUTION.

Common Law Wife, inherits from the husband. *Brewer v. Brewer's Estate*, 84.

DIVORCE AND ALIMONY.

Divorce—Action to Vacate, upon the ground that the wife's appearance and answer were forgeries, and that she was never served with process, requires proof of the forgery beyond reasonable doubt. *Boyd v. Boyd*, 293.

Mercenary Motive. To such action, instigated by a mercenary motive the doctrine of laches, estoppel and acquiescence prevails. *Id.*

Where it appears that the wife knew of the decree before the second marriage of the husband, acquiesced in it for years, and accepted alimony under a contract which recited the decree, a judgment annulling the divorce was reversed. *Id.*

Alimony. The wife's application for alimony pendente lite is not barred by a decree in a former suit in which she was convicted of cruelty to the husband. *Bagot v. Bagot*, 562.

EMINENT DOMAIN.

Discontinuance. A city prosecuting condemnation proceedings may discontinue them at any time before payment of what is awarded as compensation for the lands taken. The city may at once institute a new proceeding.

And the provision in the ordinance authorizing such proceeding that it shall be dismissed if the benefits assessed against the city exceed a specified sum is not an admission that no necessity for the improvement exists. *Post P. & P. Co. v. Denver*, 50.

Uncertainty as to Payment—Constitutional Law. Proceeding under c. 129 of the acts of 1911 demanding condemnation of private lands for a local improvement.

Sec. 7. of the act provides that a proportion of the condemnation money shall be assessed against properties specially benefited by the improvement, which when collected shall be paid into the city treasury, to be used for the payment of the awards and damages, and that the proper officers of the city shall issue warrants of the municipality to the parties entitled thereto. It was contended by the property owners that all sources from which compensation for the premises taken were limited, so that in effect no provision was made for the payment of compensation.

A like contention was made to another provision of the statute (sec. 19) looking to the payment of the compensation. *Held* the only ground for these contentions being that the special assessment against properties benefited would not be paid, which was mere conjecture, was not a sufficient ground to deny the constitutionality of the statute. *Id.*

Held further that inasmuch as the judgment of condemnation expressly provided that payment to the property owners should be "in cash or by warrants upon a fund in which money is available for the immediate payment thereof" the property owners were not entitled to question the constitutionality of the law. *Id.*

Assessment of Benefits—Railway Property, benefited by special improvements may be assessed the same as other lands. *Id.*

Order for Possession, in the first instance, even if in violation of the constitution, does not vitiate the subsequent proceedings, if regular, unless it appears that such order injuriously affected the rights of respondents. *Sternberger v. Continental Co.*, 129.

What May Be Taken. Neither public waters nor the bed or channels of public streams. *Mack v. Town of Craig*, 337.

EMPLOYMENT AGENCY.

Furnishing technically trained employes, is not subject to police regulation as are those supplying common labor. *Wilson v. Denver*, 176 Pac. 17, followed. *Interstate Business Exchange v. Denver*, 318.

License Tax. A city may impose a license tax upon such agency, in spite of the imposition of a like tax by the state. *Provident Loan Society v. Denver*, 172 Pac. 10, followed. *Id.*

Interstate Business. A society which furnishes such employes to those without the state is not entitled to the protection of the statutes regarding interstate commerce where this is not its exclusive business. *Id.*

EQUITY.

Laches. The failure to prosecute diligently a suit seasonably begun is laches. Especially where during the delay the property has greatly increased in value. *Bower v. Pound*, 457.

Improvements made by defendant during the delay afford an additional reason to deny the relief demanded. *Id.*

Rescission of Contract—Return of Things Purchased. Machinery purchased by plaintiff in reliance upon false representations of defendant. Offer to return refused. In fact the machinery was under chattel mortgage executed by plaintiff at the time of the refusal, but was not assigned as the ground of the refusal by the defendant. A release of the mortgage produced at the trial was held to render harmless any rulings of the court as to the effect of the mortgage. *Keith v. Schuck*, 480.

ESCROW.

Conditions construed. Certain promissory notes and other papers were deposited with defendant, with written instructions to the effect that if parties named should demand the paper by a day designated, the bank should surrender them. No such demand was made. The bank was justified in delivering the notes to the payees named therein. *Claussen v. First National Bank*, 331.

Violation of Conditions. Until performance of the conditions of a deposit in escrow the title to whatever is to be conveyed remains in the grantor; and if he died before the performance of the conditions the title descends to his heirs, subject only to the purchaser's contract. *Galvin v. Stokes*, 376.

Defendant company by threats of a criminal prosecution against one with whom plaintiff was associated in business induced plaintiff to deposit in escrow a certified check, upon an agreement that if a criminal proceeding then pending should not be dismissed the check should be returned. The criminal proceeding was not dismissed, but the escrow holder nevertheless delivered the check to the payee, who obtained the money thereon. *Held* that plaintiff was entitled to recover the amount of the check. *Id.*

ESTOPPEL.

Creditor of corporation. Creditor of a corporation is not estopped from asking for the discharge of a receiver of the company, where he recognizes the receivership by moving for an order requiring the filing of an inventory and applying for a transfer of unincumbered personal property, where it appears that he did not have full knowledge of the facts and conditions and the circumstances were not such as to conclusively impute to him such knowledge. *Peterson v. Daniels*, 576.

EVIDENCE.

Offer of Proof—Presumptions. It is presumed that one making an offer of proof sets forth the evidence proposed to be produced, in substance, and not in detail. *Hille v. Evans*, 98.

Parol, may vary a receipt. *Plains Iron Works v. Haggott*, 121.

Account. One suing upon an account and failing to file a copy thereof as required by sec. 69 of the code is not entitled to give evidence of his account. A book showing merely the date of a

purchase, with the amount charged, with no information as to the thing purchased, is not admissible to prove the account. *Gilmore v. Weisser*, 205.

Burden of Proof. The burden of proof is upon defendant to establish his affirmative defense contentions by a fair preponderance of the evidence. *Goddard v. Stockton*, 290.

Witness—Competency. Under Rev. Stat. sec. 7274 it is error to compel both husband and wife to testify, against their objection, in a cause seeking to impeach a conveyance by one to the other, as fraudulent against creditors. *Jasper v. Bicknell*, 308.

Exhibit not Identified as Authentic. Bill to cancel a conveyance of husband to wife as fraudulent as against creditors. The husband was examined as to a paper designated as a Transcript of Testimony given by him before the referee in bankruptcy, and the transcript itself was offered and received in evidence. Not being in any way authenticated it was held incompetent, and its admission error. *Id.*

Expert Testimony. Farmers are competent to testify as experts as to what would have been the yield of a certain crop, destroyed while immature, if it had matured, with which, and with the land upon which it grew they are acquainted. *Mayhew v. Glazier*, 350.

Expert Testimony. One called to give an opinion as to the value of property must be shown to have had means to form an intelligent opinion upon the matter. *Hoover v. Shott*, 385.

Whether a witness offered for such purpose shall be permitted to give his opinion is largely within the discretion of the court. *Id.*

Relevancy. Plaintiff attached an auto car as the property of defendant. Defendant's wife intervened, claiming the car. Plaintiff offered to show that defendant had used the car in its service, and received an allowance therefor. Held properly excluded, as having no tendency to prove whether defendant owned, leased or borrowed the car. *Beaver Park Co. v. Cowie*, 390.

Competency. Plaintiff was asked the meaning of statements contained in letters written by her. No reason for the examination being given the exclusion of the evidence was held not an abuse of discretion. *Smillie v. Mendoza*, 461.

EXECUTION.

Against the Body, is allowed only where expressly demanded by the pleadings, and where malice, fraud, or wilful deceit is alleged as the ground of such demand. *Baker v. Allen*, 59.

Mere failure to pay a draft given for the purchase of live stock is not sufficient to establish an intent not to perform a promise of payment given at the time of the purchase. *Id.*

Verdict—In the Alternative, finding defendant guilty of "fraud or wilful deceit" is not sufficient to warrant execution against the body. *Id.*

Sale—Redemption. The entire property owned by different cotenants must be redeemed. *Bailey v. Erny*, 211.

Effect. The title remains in the debtor, until the execution of the conveyance pursuant to the sale. *Id.*

The first purchaser cannot defeat the right of a second judgment creditor to redeem, by payment of the second judgment. *Id.*

EXECUTORS.

See PROBATE LAW.

FRAUD.

Fraudulent Conveyances—Consideration. The wife holding in her own name, merely for the convenience of the husband certain of his properties, exchanged the same for lands which were conveyed to the husband. The husband subsequently reconveyed these lands to the wife. The conveyance was held fraudulent as against the creditors of the husband. *Twombly v. Sauve*, 62.

Evidence. Judgment by default upon certain promissory notes of a corporation. Petition to vacate the judgment, for fraud in procuring the notes. The evidence examined and held to dispel the accusation of fraud. *Hille v. Evans*, 98.

Fraudulent Conveyances—Future Creditors, cannot complain. *Pueblo Foundry & M. Co. v. Lannon*, 131.

Statement of Value, between parties dealing at arms' length are mere expressions of opinion; so statements as to the value of certain bonds, and that they are "collectible at any bank." *Johnson v. Walker-Plath Motor Co.*, 160.

False Representation. One offering farm land for sale, represented to a proposed purchaser that a certain irrigating district had a feasible project, and would be able to apply water to the latter. Held not a false statement of any fact past, present, or to come, and affording no ground to vacate the purchase. *Madsen v. Carpenter*, 432.

Contributing to. One whose negligence enables his agent to practice fraud upon another must answer for the injury. *Greenlees v. Chezik*, 521.

GAMBLING.

Gaming Debt, is a nullity, and a pledge of personal property to secure it is void. *Benish v. Jones*, 484.

HOMESTEAD.

Homestead Entry—By Wife. Where husband and wife reside on land the title to which is in the wife, she may make the claim of homestead required by Rev. Stat. Sec. 2951. *Jasper v. Bicknell*, 308.

HUSBAND AND WIFE.

Common Law Marriage—Evidence. The evidence examined and held to establish a common law marriage. *Brewer v. Brewer's Estate*, 84.

Witness—Competency. It is error to compel both husband and wife to testify against their objection, in a cause seeking to impeach a conveyance by one to the other as fraudulent against creditors. *Jasper v. Bicknell*, 308.

INDUSTRIAL COMMISSION.

See WORKMEN'S COMPENSATION.

INHERITANCE TAX.

Statute Construed. The inheritance tax imposed by Rev. Stat., sec. 5551 is computed not upon the whole net estate, but upon such estate less the tax imposed by the Act of Congress. *People v. Bemis*, 48.

INSTRUCTIONS.

Misleading. In an action for negligence, tried in the County Court on appeal from a justice of the peace, the jury were referred to the declaration for the detail of the negligence charged. There being no pleadings in such case, *Held* that the jury were left without light as to what was alleged against defendant. *Rosenberg v. Tennant*, 80.

Assuming What is in Dispute, is error. *Id.*

Too General. Defendant erected a fence to exclude travel across the corner of his lot. Plaintiff driving against it in the evening was injured, and brought an action for the injury. The jury were told that it would be negligence to place in the former used road a barbed wire fence that might occasion damage to a traveler "by the ordinary casualties" of travel. *Held* too broad in the passage quoted. That the only damage for which defendant would be liable was that which might result from negligence in not giving notice of the presence of the fence; that the instruction took from the jury the question of the sufficiency of the notice of the change in the passage. *Id.*

Construed. An instruction the plaintiff was entitled to recover if his failure to consummate the sale was "due to the act of defendant," approved. *Millage v. Irwin*, 188.

INSURANCE.

Accident Insurance—Construction of Policy. The policy requiring a cash deposit on a day named, and the payment of a premium at a later date, and providing that if any deposit was not made, or any premium not paid, within ten days of its maturity, the policy *ipso facto* lapsed. *Held* that both the deposit, and the payment of the premium were required, to the continuance of the policy. *Employer's Mutual Co. v. Industrial Com.*, 550.

INTEREST.

When Allowed. In the settlement of a partnership interest may be charged against one partner upon advances which he has agreed to make and as to which he had failed. *Bond-McConnell Co. v. Snyder*, 288.

INTOXICATING LIQUORS.

Prosecution for the Violation of the Prohibitory Liquor Law. The evidence examined and held entirely insufficient to sustain a conviction. *Orin v. People*, 1.

Statute Construed. Liquors imported by a citizen for his own use, are not while in transit, or awaiting delivery by the carrier, or being taken by the citizen to his house, kept in any place, in violation of sec. 13, of c. 98, of the Acts of 1915. An officer has no power to take possession of the liquors under these circumstances, and the importer is entitled to maintain replevin against the officer, pending a criminal prosecution under the statute. *Külker, West v. People*, 174.

Statute Construed. Libel under the Act of 1915 as amended by c. 82 of the Acts of 1917. No search warrant being in the hands of the officer at the time of the seizure of the liquors held that the proceeding could not have been under sec. 11 and 12 of the act. Sec. 12 can be made to apply only to things seized under a warrant issued pursuant to sec. 11. *Hoover v. People*, 249.

Forfeiture. The seizure without warrant of a vehicle being used for the carriage of liquors, is justified only under section 13, and the vehicle cannot therefore be declared forfeit. *Id.*

A statute like that in question will not be construed to forfeit the property of an innocent person unless this result is unavoidable. Such a penalty must be expressed in unambiguous terms. *Id.*

Sec. 20 will not be construed to authorize destruction of the property of an innocent person used unlawfully by another, without the owner's consent or knowledge, for the unlawful carriage of intoxicating liquors. *Id.*

Legislative power. It is clearly within the power of the state to prohibit the manufacture and sale of intoxicating liquors, and to adopt any reasonable regulations to make the prohibition effective. *Galloovich v. People*, 299.

The possession of intoxicating liquors in public or semi-public places may be prohibited, as an aid to the enforcement of the statute against traffic in such liquors. *Id.*

The final provisions of sec. 1 of c. 82 of the Laws of 1917 sustained as within the legislative power. *Id.*

IRRIGATION.

See WATER RIGHTS.

JUDGES.

Calling Another Judge. An order inviting the assistance of another judge under sec. 1478 R. S. 1908, is revocable at any time before the invited judge takes charge. *People, ex rel. v. Shumate*, 566.

Not Personally Liable for Damages for Error in Judgment. Action for damages against a county judge and others for conspiracy to bring about the arrest and conviction of plaintiff for the violation of a city ordinance concerning the licensing of dogs. *Held*, that when it appeared by the complaint that defendant was charged with personal liability for error in judgment while acting as judge, the case was properly dismissed. *McPhail v. Wyand*, 593.

JUDGMENT.

Who Affected By, only parties to the action. *Reitler v. Olson*, 65.

Record—Effect. The record of a judgment by default reciting the production of evidence sufficient to sustain the complaint is conclusive upon this question. *Hille v. Evans*, 98.

Petition to Vacate, not filed till three months after its entry, and thirty days after execution issued, held too late. *Id.*

Evidence. Promise of a creditor not to press his claim, made without consideration, is no ground to vacate a judgment by default based upon such claim. *Id.*

Inconsistent. A judgment against several, the liability of one of whom exonerates the others, is error. *Plains Iron Works Co. v. Haggott*, 121.

Judgment on Error—Effect. Quo Warranto, and judgment for respondent. Reversed on Error. *Held* that though the judgment below was not superseded, the effect of the judgment of reversal was to determine that respondent's occupancy of the office was wrongful from the beginning. *People ex rel. v. Chew*, 158.

Judgment by Confession—Vacation. A judgment by confession under warrant of attorney must be vacated when the defendant, in apt time, by motion supported by affidavit, shows a meritorious defense. *Cozart v. Haines*, 261.

Construed. An order entered by the clerk cannot nullify the judgment subsequently entered by the court. *People v. District Court*, 261.

Presumptious. An order of the County Court reciting that a claim presented against an intestate estate was "a certified copy of a judgment heretofore entered against said deceased", must be taken as true and shows compliance with the statute. *Scholtz v. Hazard*, 343.

Limitations. Plaintiff obtained judgment in 1894 against one afterwards deceased. The allowance thereof against the estate in 1911 was a new judgment, to which the twenty-year limitation (Rev. Stat., sec. 7211) was no plea. *Id.*

Collateral attack. Action against the principal and sureties in a redelivery bond given in an action of replevin. Judgment for plaintiff. One of the sureties having paid the judgment brought his action against the principal and the other sureties, demanding of the principal the full amount of payment, and of the sureties' contribution. *Held* that the defendants were not permitted to question the judgment in replevin. *Dunkle v. Haight*, 404.

JURIES.

Drawing. The clerk having called the sheriff to assist him in drawing a jury, the sheriff, instead of playing the part of an inspector, himself assumed the principal role in the ceremony, thrust his hand into the box, drawing the names therefrom and handing them to the clerk.

The drawing was an open and fair one, and the names of the jurors were drawn by chance. *Held* that the purpose of the statute was substantially accomplished; and counsel for the accused having witnessed the proceeding, and made no objection until the jury were empaneled, his motion to quash the panel was properly denied. *Cohen v. People*, 10.

Grand Jury. All presumptions are indulged in favor of the regularity of the empaneling of a grand jury. *Mulligan v. People*, 17.

JUSTICE OF THE PEACE.

Sitting for Another, under Rev. Stat. sec. 3893, may try the cause; but if he fails to exercise this authority the justice by whose request he acts has not lost jurisdiction, and may proceed to judgment. *Franklin v. Barian*, 560.

Appeal—Certiorari. An appeal lies from such judgment. Certiorari thereto is not allowed. *Id.*

LEASE.

Surrender. A lease provided that the tenant might assign to a corporation of which he was a member. The purpose of the transaction was to secure the premises for a corporation to be afterwards organized, the nominal lessee having no interest. The corporation was organized and the tenant, without assuming possession, immediately assigned to it, and the corporation occupied the premises and for a time paid rent. *Held* sufficient to justify the court below in declaring that there was a surrender by the lessee, and an acceptance of a new tenant by the lessor. *Brown v. Hallett*, 316.

LIENS.

Attorney's Lien—Effect. Under Rev. Stat., sec. 242, the employment of an attorney operates as an equitable assignment of the client's right to the extent of the agreed compensation. *Dankwardt v. Kermode*, 225.

To What Causes of Action Extends. To actions for malicious prosecution. *Id.*

Superior to Any Setoff. The attorney's lien cannot be defeated by the setoff of a judgment against his client growing out of independent transactions prior to the attorney's employment. *Whitehead v. Jessup*, 7 Colo. App. 460, distinguished. *Id.*

Attorney's Lien—Properties Received by the Attorney in Trust. Plaintiffs, a firm of attorneys, contracted with the defendant, Clark, to prosecute his claim for 700,000 shares in the capital of a certain corporation and prevailed in the action. One of the attorneys afterwards received the certificates representing the shares, "on behalf of" the client, and transmitted them to a trust company in an eastern city, which held them by agreement as trustee for the client, as to a portion of the shares, and as to the residue as trustee for others who had advanced money to consummate the purchase. The attorneys claimed a lien only upon the share of the client. *Held* there was no room for the application of the rule which denies the attorney a lien upon properties held for a special purpose, adverse to the lien. *Clark v. O'Donnell*, 279.

Notice of the Lien. An agreement by the client with others who provided the money required to complete the purchase of the shares, that the certificate should be deposited with a certain trust company, for the benefit of the client and these contributors, and the actual transfer of the certificates to the trust company, with notice of the lien upon the interest of the client, was held not to defeat or impair the lien. *Id.*

The notice required by the statute is not a prerequisite to the validity of the lien. *Id.*

Properties Held by Another, as trustee for the client, but which are the result of the attorney's services, are subject to the lien. *Id.*

LIMITATIONS.

Bond—Surety how affected. As to a surety seeking contribution, from his co-sureties the statute of limitations does not begin to run, until discharge of his liability as surety by payment. *Dunkle v. Haight*, 404.

MANDAMUS.

Pleading. The petition for mandamus to compel payment of matured coupons of an irrigation district must show a previous demand upon the officers of the district. *Henrylyn Irrigation Dist. v. Howard*, 236.

MORTGAGE.

See REAL PROPERTY.

MUNICIPAL CORPORATIONS.

Amending Ordinance. The amendment of one section of an ordinance under a charter provision similar to that contained in sec. 24 of art. V of the Constitution, does not require that the residue of the ordinance shall be reprinted. *Post P. & P. Co. v. Denver*, 50.

Damages—Sidewalk. In actions against municipal corporations for personal injury attributable to defects in the public walk, each case must, as to the character of the defect, be governed by its own circumstances. *Denver v. Hatter*, 194.

Liability in Respect of Public Works Constructed by it Beyond the Corporate Limits. The city of Denver, acting under legislative authority, contributed money to aid in the construction of a public road extending beyond its limits, and its officials having authority in the premises sent employees to assist in such work. They were guilty of negligence, and damages ensued to one using such highway. The municipality was liable. *Denver v. St. James Co.*, 208.

Powers. A town has no authority to condemn for sewer purposes private land situate without its limits; nor to pollute a public stream with sewage. *Mack v. Town of Craig*, 837.

Powers. A city having express authority to operate works of public utility, e. g., for supplying water, light, steam, electric power or the like, acts in a proprietary or business capacity and may lawfully sell any surplus of that which it produces. *Larimer Co. v. Ft. Collins*, 364.

And may at public expense construct the appliances necessary to convey such surplus to the place where there is a demand for it, even though to points without the municipal limits. *Id.*

Contract construed. The county applied to the city council for permission to connect with the city water-works, a pipe line without the city limits, to convey water to the non-residents of the city, agreeing that those using water therefrom should pay therefor, "at the schedule rates now or hereafter adopted"; that the costs of the connection, and the extension, should be paid by the county, and that "Whenever the service of said extension shall pay to the city an amount equal per annum to 20 per cent.

of the cost thereof "the line should be conveyed to the city, and the costs of construction, "according to prices then prevailing", should be paid to the county. This petition was allowed and the line constructed and operated for a series of years. Action for the cost of construction under the last clause of the contract.

Held a valid contract, not *ultra vires* and that the city was liable. *Id.*

Prior appropriation. There being no certainty that any expense would ever be incurred by the city, and no indebtedness created within the year in which the contract was made, *Held* that sec. 6633, Rev. Stat. was inapplicable and not controlling. *Id.*

Public works. The improvement was not a public work constructed by the city and it was not required that the work would be let to the lowest bidder. *Id.*

NEGLIGENCE.

Right of Property Owner to Prevent Invasion Thereof. The owner of a city lot may erect a fence to obstruct travel across the corner thereof. *Rosenberg v. Tennant*, 80.

The character of the obstruction does not concern the public save so far as it will or will not afford notice of its presence to those attempting to use the cut-off. In an action by one injured by collision with the fence, in the night-time, the amount of travel over the cut-off, and the length of time it had been used are to be considered in determining the question of negligence. *Id.*

Public Highway. An uncompleted bridge in the public highway is left without lights or guards in the night time, and by reason of these conditions an accident occurs to the traveler who is proceeding with due care. Those chargeable with the neglect are liable to the injured party. *Denver v. St. James Co.*, 203.

NEW TRIAL.

Newly Discovered Evidence, merely cumulative is no ground for a new trial. *Greenlees v. Chezik*, 521.

OFFICERS.

School Directors—Duties, are performed in and relate exclusively to their own districts, respectively. That they act under the laws of the state does not constitute them officers of the state. *Guyer, v. Stutt*, 422.

ORDERS.

Without Notice. An order made without notice, calling another judge to preside at a trial, if it be regarded as under code sec. 31 concerning change of venue, is without effect, even though made on the court's own motion. *People, ex rel. v. Shumate*, 566.

PARTNERSHIP.

Parties may form a partnership without intending it. Plaintiff and defendant entered into a contract for the purchase and sale of lambs; defendant to furnish the money necessary to be advanced upon the purchase, and plaintiff to conduct the purchase and sales. Each to share in the profits, and be liable for the losses, in specified proportions. *Held* a partnership. *Bond-McConnell Co. v. Snyder*, 238.

Assumption of Indebtedness. Notes and mortgage executed by individuals in contemplation of the organization of a copartnership and for its use and benefit, which were adopted by the copartnership with the knowledge and consent of all the parties interested, became its notes and mortgage. *Great Western Co. v. Elledge*, 594.

PAYMENT.

Voluntary—When May Be Recovered. Money voluntarily paid under no mistake of fact, and without fraud or imposition upon the one making the payment, cannot be recovered; e. g., where under a contract by which he is only conditionally liable the party with full knowledge of all the facts makes payments upon account of such contract, they cannot be recovered. *Houston v. Snyder*, 214.

Retaining the notes of the third party after agreeing to their application as payment amounts to an acceptance of them, as such, and to an acceptance of the parol agreement to apply them upon the debt. *Gillett v. Flora*, 218.

Need Not Be in Money. Whatever is given and accepted as a discharge of liability is payment, e. g., an agreement at the time of the execution of a promissory note, to apply thereon the notes of another which the payee has before that obtained from the maker. *Bartholomew v. Emerson-Brantingham Co.*, 244.

Effect. Action demanding \$3,000. Judgment for plaintiff for \$1,000. Plaintiff having brought error he was held entitled to the \$2,000 previously denied to him. Payment meantime of the \$1,000 had no effect to impair plaintiff's right of action. *Thomas v. Selkregg*, 360.

Check Accepted by Mistake. An accident insurance company made it a practice not to accept a delinquent check until examination made as to whether the insured had sustained an accident after his default. A clerk of the company by mistake sent the check to the bank for deposit, on the day of its receipt. This was on Saturday, and upon the following Monday the company withdrew the check, and the amount thereof was charged against it by the bank. The check was returned to the person from whom it came. Held that the mistake of the clerk did not charge the company. *Employers Mutual Co. v. Industrial Com.*, 550.

PLEADINGS.

Admission of Validity of Part of the Indebtedness—Effect. Where the petition to vacate a judgment by default admits the validity of a portion of the indebtedness upon which such judgment is founded, the petitioners should offer payment, or permit judgment for what is so admitted. *Hille v. Evans*, 98.

Amendment. In an action by the widow of a railroad employe for the death of her husband, it developed that the railway company was engaged in interstate commerce, so that no action lay by the widow, but solely by the personal representative. The cause being remanded, the widow, having been meantime appointed administratrix was permitted to amend her complaint, alleging her representative capacity, and the interstate character of the railway company. *Wilson v. D. & R. G. Ry. Co.*, 105.

Want of Consideration, need not be pleaded. *Plains Iron Works Co. v. Haggott*, 121.

Statutory Denial, must be in the exact words of the statute. An averment in the reply that "plaintiff has not and cannot obtain sufficient information, &c." held fatally defective. *Johnson v. Walker-Plath Motor Co.*, 160.

The statutory denial is not permitted in traversing the contents of a public record; and the addition of an express denial as a conclusion from the statutory denial does not aid the matter. *Id.*

Demurrer Sustained—Effect. Sustaining a demurrer to the answer and entering judgment on the pleadings, without hearing evidence, admits the allegations of the answer. For the purposes of review they are taken as confessed. *Kilker, West v. People*, 174.

Joinder of Causes of Action. Defendant, a builder having a contract for the erection of a cathedral, employed plaintiff to superintend the work, for certain salary and a percentage of the profits. This contract was admitted. Plaintiff alleged another similar contract as to the superintendence of the work of construction, upon another important building. This contract defendant denied. *Held* that plaintiff being entitled to an accounting of all the gains made upon both the contracts had properly joined them in one count, demanding an account of all profits on both contracts; that the provisions of the code, sec. 76, have no application. That the parties were not partners was immaterial. *Olson v. Harvey*, 180.

Separate Causes of Action—Statement of. Plaintiff in single count set up two contracts, demanding an accounting under each. The two contracts were separately stated. *Held* that though the words, "And for a second cause of action" were not inserted preceding the statement of the second contract there was no confusion of the issues and the defendant was not misled. *Id.*

Action Premature. Must be specially pleaded. *Id.*

Amendment. Defendant's application for leave to amend his answer so as to forfeit all plaintiff's interest, held properly denied. *Id.*

Waiver. Answer after the denial of a motion to separate causes of action is a waiver of the motion. *Id.*

Defense Not Pleaded, cannot be asserted or considered. *Jasper v. Bicknell*, 308.

Sham Plea, is one which is good in form but false in fact. *Bollen v. Woodhams*, 322.

Motion to Strike, as sham, should be granted only on the most careful consideration. *Id.*

The motion should precede a demurrer. *Id.*

Waiver. Answer and proceeding to trial after the overruling of a demurrer waives the error in that ruling, except as to the ground that no cause of action is stated. *Mayhew v. Glasier*, 350.

Construed. The complaint alleged that defendant agreed to "immediately forward" to the home office of an insurance company, plaintiff's application for insurance of a certain crop against injury by hail; default made and subsequent injury to

the crop by hail. *Held* that defendant was the agent of plaintiff to forward the application, that in this application he acted for himself and not for the insurance company, and that a cause of action was shown. *Id.*

Amendment—Upon trial, not prejudicial, is not error. Id.

Answer filed after time, is not to be stricken out. Ryan v. School District, 370.

Irrelevant matter. Plaintiff whose motion to strike the answer has been denied, is, under the statute, entitled to have stricken therefrom matter not properly belonging therein, and if this is denied him he is entitled to reply. *Id.*

Averment—Conclusions drawn from pleadings. Action upon contract. Plea that the contract "as shown by the pleadings", was not to be performed within one year, *Held* not a statement of fact and not admitted by failure to deny it in the reply. *Id.*

Amendment—Diligence. Leave to amend an answer is properly denied where it appears that at the filing of the original the defendant was sufficiently advised of the matters properly introduced by amendment. *Beaver Park Co. v. Cowie, 390.*

Mandamus. A petition for mandamus to compel payment of matured coupons of an irrigation district, must show a previous demand upon the officers of the district. *Henrylyn Irrigation Dist. v. Howard, 286.*

Want of Consideration. Where defendant, in an action upon contract, would plead want of consideration he must set up the facts from which this conclusion is to be drawn, so as to advise the plaintiff what he will be called upon to meet by way of evidence. *Abdun-Nur v. Valdez, 334.*

Plea construed. Action by physician upon a promissory note bearing the signature of defendant. Plea that "if ever signed by defendant it was when defendant was in such feeble mental condition that he was unaware of what he was doing, and such note was based on no consideration." *Held* that plaintiff was not thereby advised that defendant would prove an agreement that a sum paid by defendant should cover all treatments past and future, nor that plaintiff's services were given gratuitously, nor that defendant would deny the consideration; that the plea offered no issue. *Id.*

Cause of Action not Sufficiently Pleaded. The only cause of action suggested by the complaint not being sufficiently stated, the demurrer was properly sustained. *Richardson v. Cornell, 411.*

Want of jurisdiction as a defense, when it depends on a question of fact, must be pleaded affirmatively. People ex rel. v. County Court, 420.

Former Judgment—As a Defense—Must always be pleaded. Petition for prohibition to restrain the County Court from entertaining the petition of a divorced wife for custody of the children. The contention of the respondent husband was, that in *habeas corpus* proceedings in the District Court, the children had upon the same facts been awarded to him. But no answer pleading the judgment of the District Court had been filed. The petition was dismissed. *Id.*

General Denial, to a petition in intervention claiming ownership entitles the defendant to the benefit of any evidence tending to contradict such claim. *Benish v. Jones*, 484.

Admissions by, cannot be contradicted. *Greenlees v. Chezik*, 521.

Payment—Plea of, admits the original liability, and the defendant is estopped to deny it unless fraud, duress, or the like be shown. *Id.*

Improper Parties. Where an action is brought against the county commissioners to compel the doing of an act which can only be performed by the county treasurer under the statute, the treasurer not being joined as a party, a general demurrer to the complaint was properly sustained. *Kobey v. County Com's.*, 570.

Motion to Strike. Good pleading prohibits the anticipation in a complaint of matter of defense, and such matter should be stricken. *Newell v. Newell*, 585.

Immaterial Allegations. There is no good excuse for confusing an issue and encumbering a record with irrelevant allegations. Trial courts, while they have a large discretion in determining motions to strike, should give to pleadings such consideration as is necessary to insure the presenting of only those facts which are pertinent to the cause of action. *Id.*

Accord and Satisfaction must be pleaded if evidence is to be introduced to support the plea. *Scott v. Gilmore*, 590.

PRACTICE.

Bill of Review—Leave to File, is not necessary where it is merely sought to correct an error of law apparent on the face of the record; otherwise where newly discovered evidence is relied upon. Where both error in law and new matter are asserted, leave must be obtained. Error appearing only by reference to some public office does not entitle the party complaining to file his bill without leave. *Johnson v. Rycraft*, 547.

PROBATE LAW.

Appeal—County to District Court. An appeal lies to the District Court from an order of the County Court setting aside the previous allowance of a claim against a decedent's estate. *Scholtz v. Hazard*, 343.

Notice—Evidence. The papers and files of a cause determined in the District Court on appeal were returned to the County Court five days before the estate was declared insolvent and closed. Held that one with whom the executors and heirs had stipulated for such declaration of insolvency, etc., was in no position to allege ignorance of the judgment of the District Court. *Id.*

Limitation. A claim filed against a decedent's estate within eight months after the granting of letters of administration, is within the time limited by the statute of non-claim. *Id.*

Laches. A delay of six months in the institution of an action to unravel the fraudulent closing of a decedent's estate, was held, under the circumstances of the case, not laches. *Id.*

Administrator—Duty and Liabilities. An administrator is trustee for all the creditors of the estate and it is his duty if possible, to redeem the estate from hostile holdings or sell it for an amount which will pay every creditor, in whole or in part. *Id.*

An administrator who, for his own gain, assumes a position in hostility to a creditor, and arranges that his own claims as heir at law shall take precedence of the claim of the creditor commits a fraud. *Id.*

Party to Fraud. One who enters into a contract with an administrator by which the administrator is disabled from performing his duty to a creditor of the estate will not be heard to say what the administrator might have or might not have done, but for his unlawful conduct. *Id.*

Executors and Administrators—Discharge of, does not impair the right of the plaintiff in a pending cause to proceed to judgment. *Thomas v. Selkregg*, 360.

Bill of Sale—Intended to operate as a will. Plaintiff was demanding certain articles of jewelry and other properties, formerly the property of a Mrs. Bristow, and upon deposit in the bank. She was opposed by the administrator of Mrs. Bristow's estate. It appeared that this lady, being in difference with her husband, consulted an attorney as to a will which she had executed in favor of plaintiff, and was advised that she could not lawfully devise away from her husband more than one-half of her property. Shortly thereafter Mrs. Bristow executed a bill of sale conveying to plaintiff all her personal effects, and the same day plaintiff executed a like bill of sale to Mrs. Bristow. The safety deposit box in which all the properties in question were deposited was rented in the name of the two ladies. From these and other circumstances held that the court below was correct in its conclusion that the purpose of the two ladies was to vest in the survivor of them the properties of the other, and in effect created neither a sale nor a gift. *Clarke v. Commerce Bank*, 401.

Executors—Authority Before Probate. Even before probate of the will the executor may employ an attorney to aid in securing moneys pertaining to the estate. Secs. 7103, 7138 of the Revised Statutes do not support a contrary resolution. *Regents v. Andrew*, 556.

Employment of Attorney. The executor may employ counsel to aid in the preservation of a private corporation in which the estate is largely interested. *Id.*

PROHIBITION.

When the writ lies. Not when the error complained of may be reviewed on error. *People v. District Court*, 261.

PUBLIC UTILITIES.

Review of Findings of Utilities Commission—Jurisdiction of Supreme Court. Under the statute the Supreme Court is authorized to set aside or modify the order of the Commission, if not supported by the evidence; but not to revise findings of fact upon conflicting evidence. *A. T. & S. F. Ry. Co. v. Public Utilities Com.*, 92.

Jurisdiction of Commission. The local service of a Public Utilities Corporation doing business at Denver is controlled by the City, and not by the Utilities Commission. The local freight service, i. e., hauling between points within the switching limits of the Denver yards is therefore beyond the jurisdiction of the State Commission. *Id.*

Considerations Controlling the Commission. In determining the reasonableness or unreasonableness of the carrier's charge, switching ought not to pay all the interest and taxes upon the terminal property, because the property is devoted to switching only in part, and is in fact part of the line. Each of the several uses to which the terminal and its facilities are devoted should bear a fair proportion of the terminal expense. *Id.*

Public Utilities Commission—Powers. The Utilities Commission was held authorized to grant to a corporation furnishing electric power, an increase in the rate of charge fixed by a prior contract. *Ohio & Colo. S. & R. Co. v. Utilities Com.*, 137.

But the commission having by no competent testimony attempted to establish the value of the Utility Company's property, its order was set aside. *Id.*

The power of the commission to determine that the rate of compensation fixed by a contract is insufficient, is a very grave and dangerous power, to be asserted with the greatest caution. *Id.*

The capitalization of a concern has but little relation to its value, as affording a basis of rates. *Id.*

Rehearings. A witness eminently qualified to speak as to the value of the plant of a utility company which has been authorized to increase its rates, was absent at the original hearing, but accessible when a motion for a rehearing came on. *Held* it was the clear duty of the Utilities Commission to reopen the case. *Id.*

Public Utilities Commission—Powers. The commission is without power to fix rates in municipal corporations organized under Article XX of the Constitution; and does not acquire such jurisdiction even though such municipalities fail to act, or proceed illegally. *Pueblo v. Utilities Com.*, 155.

Police Power—Unreasonable Order, made by a Public Commission is void. *C. B. & Q. R. Co. v. Utilities Com.*, 475.

Presumption. Orders of a railway commission are presumptively reasonable and will not be overturned unless the contrary clearly appears. *Id.*

Order to Railway Company to Establish a New Station, sustained. *Id.*

That the railway was subject to federal control under the act of March 21, 1918, was held, in view of sec. 15 of the act, and a general order of the Director General of Railways, not to invalidate the order. *Id.*

An order of the federal official limiting the expense of any improvement, *held* not to refer to expenditures made under police regulations of the state. *Id.*

Public Utilities Commission—Jurisdiction. The Public Utilities Commission has no jurisdiction to establish rates to be charged by public utilities within the limits of cities named in Article XX of the Constitution, known as the Home Rule Amendment. *Golden Cycle M. & R. Co. v. Colo. Spgs. Co.*, 588.

An order increasing the rate to be paid by a consumer to a light company, for electric current, which is fixed from a consideration of what the rate should be in a territory over which the commission has no jurisdiction, held invalid. *Id.*

Rates. Rates established by a tribunal having authority to establish them, are *prima facie* lawful and reasonable. *Id.*

QUO WARRANTO.

By Private Relator. Under license from the city the defendant had, at great expense, constructed a line of telephone occupying with its structures the public streets. The city had accepted and was still accepting valuable services from defendant, and had taken no step to revoke the license. Held that a private citizen was not entitled to quo warranto to oust defendant of the franchise, especially as the municipality had the power of revocation, and the like power was vested in the inhabitants through the initiative. *Mt. States Telephone Co. v. People*, 487.

REAL PROPERTY.

Mortgage—Assignment. A mortgage was assigned "with the notes therein described, without recourse in any event." Held, that though the defendant had previously endorsed the notes, the endorsement and assignment being parts of one transaction, though of different dates, were to be construed together. *Gillett v. Flora*, 218.

Purchase Money Mortgage—Effect. A mortgage of land executed by a purchaser thereof contemporaneously with the acquisition of the title, or afterwards as part of the same transaction, is entitled to preference over all other claims or liens through the mortgagor, even though prior in time. Plaintiff conveyed lands to Ward taking back a mortgage for the balance of the purchase money. A prior judgment against Ward, duly recorded, was held subordinate to the mortgage. *Emery v. Ward*, 378.

Deed of Trust—Reformation or Rescission—Election. Where facts justify either reformation or rescission, party must elect and abide by such election. *Feit v. Reichert*, 410.

Abstract. A "proper abstract", held to be one showing merchantable title. *Morgan v. Howard Realty Co.*, 414.

RECALL.

The Recall of Officers—School Director. Section 1 of Article 21 of the Constitution (Laws 1913, p. 672) applies only to elected public officers of the state. City, county and town officers may be recalled under section 4 of the Act. *Guyer v. Stutt*, 422.

RECEIVERS.

Discharge of. A judgment creditor is entitled to the discharge of the receiver of a debtor corporation where it appears that at the time of the institution of the receivership proceedings, the company was solvent and conditions were such that the appointment of a receiver was unwarranted. *Peterson v. Daniels*, 576.

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Ejusdem Generis, has no application where the signify subjects differing greatly from one another.

Statutes of Different Date. The statutory regulation of barber shops by the act of 1909 (c. 138) is not to be controlling the interpretation of a statute enacted previous thereto. *Id.*

In construing the provisions of Rev. Stat. sec. that all persons shall be entitled to the accommodation of "barber shops," the provisions of sec. 3 of chapter of 1917 providing that no person shall be publicly excluded because of race, etc., are without import.

Equal Employment of Public Accommodations construed. Boot-blackening stands are within the provision. Stat. sec. 609. *Id.*

Construction. A particular power given in clear words should have effect, as against general expressions, especially, when to adopt the other interpretation would render the clear and definite provision mere surplusage. *v. Stutt*, 422.

Statute of Frauds—Part performance of an oral contract for the sale of lands is a defense to an act impeaching only where it appears that the act relied upon as part performance was at the time known to the other party. *Knoff v. Grace*, 527.

Idem. The act relied upon as part performance of a contract is not enough. Doing something in reliance upon the contract, is not enough. *Id.*

Taking possession of lands under a verbal lease and payment of rent do not amount to part performance. Reliance upon must be consistent with no other theory than the validity of the alleged contract. *Id.*

Statute of Frauds—Contract for the Carriage of water by the proprietors of an irrigating ditch. The waters of another ditch is not within the statute. *Hoehne Ditch Co. v. Flood Ditch Co.*, 531.

Part Performance. Verbal contract to carry water was completely observed by the parties during the season. Held it could not be said that the contract was completely performed, in the ordinary sense. *Id.*

SUBROGATION.

Plaintiff was surety in the bond of a bank whose treasurer deposited the moneys coming to his hands. A practice grew up by which the treasurer would give the bank a receipt for the taxes of customers of the bank and the bank would give credit to the treasurer for the amount of the receipts. The bank having failed the surety company was liable for and paid to the treasurer, the total of the taxes credited to him upon the books of the bank, and lost the amount and the treasurer paid the amounts to the county of plaintiff to the treasurer Canon, was a provision of payment of a claim under the bond the company was immediately subrogated to all the rights of the plaintiff in the amount of such payment," and the surety company was liable for the amount of such payment.

action claiming that the taxes upon the property of defendant were discharged out of the money which it had paid to Canon and that it was entitled to be subrogated to his right as treasurer to enforce a claim against defendant's property to the amount of the tax, so discharged. *Held* that this contention was based upon the false assumption that the treasurer paid the tax with the proceeds of the judgment against plaintiff; that, in fact, in paying the judgment plaintiff paid no judgment to Canon, but a debt which it owed, not to Canon in his own right, but as county treasurer, and having paid nothing to him, it was not subrogated to any right of his. *National Surety Co. v. Canon Block Co.*, 171.

SUPREME COURT.

Quorum. A majority of the judges constitute the quorum of the court. *Mt. States Telephone Co. v. People*, 487.

Majority of the Quorum. The judges constituting a majority of the quorum may speak for the court in the decision of any case. *Id.*

TAX CERTIFICATES.

Assignment of Tax Certificates. Section 6439 M. A. S., 1912, confers upon the board of county commissioners authority to determine the sum at which a tax certificate, belonging to the county, may be sold, but leaves the duty of making the assignment of certificates to the county treasurer. *Kobey v. County Com's.*, 570.

TRIAL.

Matters Not in Issue. Real estate broker suing for an agreed commission, the *quantum meruit* is not involved. *Millage v. Irwin*, 188.

Directing Verdict, Disregarding Former Opinion of This Court. Where the District Court directs a verdict for the defendant, the evidence being substantially the same as examined upon the former writ of error, in which it was held that the issues must be left to the jury, the judgment is reversed. *Pierce & Zahn v. International Book Co.*, 305.

Re-Examination of Witness. It is error to deny to a party the right to re-examine his witness after cross-examination under the statute. *Jasper v. Bicknell*, 308.

The question whether there was a surrender, and a release of an original lessee held one of fact. *Brown v. Hallett*, 316.

Tort—Damage—Non-suit. One complaining of a tort and failing to show any damage therefrom is properly non-suited. *Hoover v. Shott*, 385.

Directed Verdict—Non-suit. Where the plaintiff produces evidence sufficient to go to the jury neither a non-suit nor a verdict for defendant can be directed. *Beaver Park Co. v. Cowie*, 390.

Continuance—Absent Witness—Materiality of Testimony. Application for a continuance—absence of a witness, setting forth what his testimony would be. These statements being mere conclusions, *held* not a compliance with Code sec. 1908. For this reason and because no diligence was shown to secure the attendance of the witness a denial of the application was approved. *Durham v. Wilson*, 430.

Remarks of the Court. Informal and desultory remarks of a judge at the close of argument are not findings of fact properly so called, and have not the force of a special verdict. *Jones v. Boyer* 568.

TRUSTS.

Resulting Trust. Walker, an agent of plaintiffs, lent considerable sums of money for their account secured by trust deed of lands. He afterwards obtained possession of the notes, foreclosed the mortgage, caused the lands to be conveyed to one Schaffer, caused Schaffer to execute his deed of trust of the lands for securing a note of \$7,000 payable to Walker, caused Schaffer then to convey the lands to another, subject to deed of trust for \$7,000, and caused a deed of trust of the same lands to be executed by the one holding the title, for securing a note of \$3,000 to the defendant. All these transactions were without the knowledge of plaintiffs. *Held* that the plaintiffs having provided the funds which secured the lands, a trust resulted in their favor superior to the claims of plaintiffs, and a conveyance to them ordered. *Young v. Hinds*, 164.

UTILITIES COMMISSION.

See PUBLIC UTILITIES.

VERDICT.

In the alternative, finding defendant guilty of fraud or wilful deceit, is not sufficient to warrant execution against the body. *Baker v. Allen*, 59.

WAIVER.

Waiver of Defenses—An Act Done in Ignorance of the existence of facts which warrant the defense effects no waiver. *Employers Mutual Co. v. Industrial Com.*, 550.

WATER RIGHTS.

Adjudication—Who May Assail—Statute Construed. The phrase "any party or parties feeling aggrieved" as used in sec. 3315 of the Revised Statutes does not include appropriators in another water district, who are not parties to the adjudication. *Ft. Lyon Canal Co. v. National Sugar Co.*, 36.

Parties aggrieved by such decree may obtain relief by pursuing the provisions of Rev. Stats., sec. 3313. *Id.*

Abandonment. The mere expressed intention to abandon a right in water is without effect to deprive the owner so expressing himself. *Rio Grande R. & D. Co. v. Wagon Wheel Gap Co.*, 437.

Seepage, escaping from a reservoir is part of the stream from which it was diverted. It is regarded as already appropriated by those having adjudged priorities and is not subject to appropriation. *Id.*

Adjudication of Priorities—Decree. Doubted whether a decree for direct irrigation can be granted in a proceeding to secure storage rights. *Id.*

Discriminations—Relief. The court below having denied the benefit of the doctrine of relation as to plaintiffs in error, who were shown to be entitled to it, the decree was reversed with specific directions to the court below to allow the several appropriations claimed by plaintiff, and the date and volume of each. *Id.*

WORDS AND PHRASES.

Holding a Position, means lawfully holding it. *People ex rel. v. Chew*, 158.

The "Legislature," as used in Article 5 of the Federal Constitution, means the body composing the ordinary law-making body of the state. *Prior v. Noland*, 263.

"Proceeds." The word must be interpreted from the context of the writing in which it is used, and the circumstances of the case. *Kingsbury v. Riverton-Wyoming Co.*, 581.

WORKMEN'S COMPENSATION.

Industrial Commission—Findings of Fact, by the commission as to the number of employees, of an employer may not, ordinarily, be disturbed by the court. It is error to set aside such finding when supported by the testimony of the employer himself. *Industrial Commission v. Shadowen*, 69.

Who Within the Statute—Farm Laborers. One who goes from farm to farm operating a thresher is not a farm laborer within the exception contained in clause III of sec. 4 of the Session Laws of 1915, c. 180. *Id.*

Course of Employment. Where the servant loses his life in an attempt to save a fellow servant from injury, he is acting within the course of his employment. *Brock-Haffner Co. v. Industrial Com.*, 291.

Industrial Commission—Finding of, if supported by the evidence must be accepted by the courts. *Id.*

Disobedience of Orders or Rules—Effect. The transgression of an order or prohibition which deals only with the workman's conduct within the sphere of his employment will not prevent the recovery of compensation. Otherwise where the workman disobeys a rule or order which limits the sphere of employment. *Industrial Commission v. Funk*, 467.

The workman was directed not to work under an overhanging bank without first caving it down. *Held* the order was one only dealing with the workman's conduct within the sphere of his employment. *Id.*

Violation of a Rule Prescribed for the Workman's Safety, has the effect to reduce the compensation 50 per cent. *Id.*

Casual Employment. That the servant is not employed for any specified time does not render his employment casual under sec. 4 (d) II of the Workmen's Compensation Act (Laws 1915, c. 179). *Id.*

A workman mining silica for use in the manufacture of brick at the works of his employer, and working with regularity, *Held* not a casual employee. *Id.*

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So that the injury occurs shortly after the e
work. *Id.*

Number of Employees—Statute Construed. '
four men are employed in extracting silica for
yard conducted by their employer, where there
ployes, does not bring the case within sec. 4 (d)
Id.

The manufacture and procuring the material f
but one business. *Id.*

C.A.C.
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